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JAMES WILSON AND THE SO-CALLED YAZOO FRAUDS.

In the month of November, 1906, there came together in the city of Philadelphia a great number of persons from all parts of the United States. They came to do honour to the memory of James Wilson,[1] a man who, endowed with unusual gifts of mind and character, had been enabled to do a great work for his chosen country. An ardent friend of the people; instrumental in securing the passage of the Declaration of Independence, of which he was a signer; the greatest constitutional lawyer who took part in the debates of 1787, when the Federal Constitution took its form, he made possible by his logic and his eloquence the ratification of that Constitution by the State of Pennsylvania. He illuminated its more obscure phrases by the light of his trained and brilliant mind, and by his clear and forcible oratory brought

[1] Mr. Wilson died at the home of his friend, Justice Iredell, in Edenton, N. C. It was desired by many persons that his last resting place should be in the place where his life work was done. In fulfillment of this desire, in November, 1906, in the presence of a large number of representative persons, gathered there from all parts of the United States, his body was reverently reinterred in a tomb directly beneath the walls of Christ Church, Philadelphia.

the benefits which were to come from it home to the minds of the less informed masses. The heavy burdens of the time he accepted with patriotism, bore heroically, and dying left behind him the record of a great life work greatly done. So in this later time men met together to do him honour. But there were those who looked on curiously, wondering why the memory of a man they chanced to know little about should be thus greatly honoured. Some of these were men of the sort who are always industriously seeking the petty among the characteristics of great men; who note the few times that George Washington lost his temper in those long years of stupendous endurance; who magnify the foibles of Jefferson, to the obscuring of his genius; who rejoice in the puerile, which they find mentally measurable, and ignore the great, for which they have no adequate mental measure. To such men, unlearned in the true history of their country, having but a text-book knowledge of the men who made her great, the idea that James Wilson was one of that country's greatest men came as a surprise. All over the land and at all times and periods men had known the virtues, reverenced the wisdom, and praised the character of James Wilson. But they had been men of letters rather than journalists; scholars, whose quiet commendation reached their own class rather than the world at large; professors in colleges; students of the Constitution; statesmen and historians. It was to no stranger that men of this class came to pay the homage of their respect; they had long known the debt they owed to him and they rejoiced that they were called upon publicly to pay it. But there were those who did not understand all this, or who wished to bring upon themselves a certain notoriety, and to these an opportunity seemed to present itself. James Wilson had died poor; that argued that he must have died obscure. James Wilson had been buried in the quiet country town where he had died; that argued that he was not respected; James Wilson's name was not familiar to them, and that was proof that he was unknown. So they sought—not for the record of a quiet

virtue that might have long lived unknown, but at last come to recognition; not for great thoughts flowering unnoticed for a time, but quietly bearing fruit for future times; not for the records of good deeds done in days long past, but just being written into history—but for some deed of shame which would excuse their ignorance and confuse the foolish souls who had believed in so much goodness. They needed not to search long before they found what seemed the record of an evil deed, and that deed done in the days in which James Wilson lived, and among the names connected with that deed—names honoured for generations—was that of James Wilson. On December 16, 1906, an anonymous writer for the *Independent* announced in the columns of that paper, under the heading "Beatification of a Briber," that James Wilson was a "corruptionist and bribe-giver, the leader of the 'land sharks' of 1795." While specific charges were made, no authorities which might substantiate the statements were given.[2]

In March, 1804, Mr. Rodney, in a speech on those Georgia claims, which had reference to these transactions in land to which the writer in the *Independent* appears to have reference, said: "We can with great ease hop and skip over truth and perch upon assertion and call it truth." To hop and skip over truth, and, perching upon assertion, call it truth, is an action not especially characteristic of any one age or period. If it was done, as Mr. Rodney would seem to imply, in the early days of the republic, we have not learned in these later days to be less agile when confronted with truths upon which we do not wish to take our stand. The perch upon assertion is indeed a favorite position of those whose footing upon truth is of an unstable, and necessarily uncomfortable, nature; giving them a commanding and exalted position—so long as they remain thereon unmolested. A striking exemplification of this tendency to leave the stable ground of truth for the swaying branches of assertion is given by the writer of the anonymous article in the

[2] *The Independent*, New York, December 16, 1906.

Independent. The burden of proof to establish the verity of the statements so publicly put forth was upon those who formulated them. The editor of the *Independent* being communicated with, he courteously responded, and, while withholding the name, furnished a list of authorities on which the writer of the article claimed to have based his statements. These authorities, and many more, have been consulted, with the result that the anonymous writer appears to be left still precariously swaying upon the bare branches of assertion, while the firm ground of truth affords him no foothold. In the search for the truth about James Wilson, however, the truth about the whole matter presented itself in a new light, and it appears that, if the matter shall ever come to be sifted with care and skill by some one competent to the task, taking time to make a full and impartial investigation, it may be found that those who, in an attempt to throw dishonour upon an honoured name, have revived an interest in some almost forgotten facts, have done a service to their country—unexpected to them, it is true, possibly to be regretted by them, as leaving one less recorded evil in the world—but a very real service, none the less.

After the forming of the present Federal Government a large number of companies were formed to develop the western lands. Many of them came to be known by the title of "Yazoo" land companies, taking their name, apparently, from a river of the region which formed one of the boundaries of the land claimed by the State of Georgia, lying west and south of the boundaries of the present State. In the Act of 1803, it is spelled "Yassous," and the name seems to have been used as a convenient term for most of the companies, not only the Georgia, but the South Carolina, the Virginia, and the Tennessee companies. Historians of the United States, writing of the years between 1789 and 1814, have had occasion to refer more or less extensively to certain very large transactions by some of these companies, which some of them came to call the "Yazoo frauds." They usually mentioned them only in passing, and a comparison

of the details given leaves us free to suppose that the later writers did not, as a general thing, refer to original documents or the printed archives of the United States, wherein the matters referred to are set out in full, but instead relied upon the researches of previous writers upon the subject. As even those previous researches into the histories of the land companies were of a very limited nature, if one may judge by results, it came to pass that certain things, and certain things only, were said upon the subject, and that all these things bore a very striking family resemblance. The gossip of the time, the statements of interested persons, the political polemics of the orators of the day, were incorporated into the printed pages of history, and this being done, the fact that fraud had been committed was assumed, and the "Yazoo frauds" passed into history. One or two writers of monographs explored the ground more carefully, especially Mr. Haskins,[3] and some of their statements, if incorporated into the history of the matter, might change very materially the status of these land companies. Much more remains to be done, however; there is no full and complete record extant, giving a history of these companies from the time of their first application for a grant to the Legislature of the State to the final end of the entire matter by the passage of the Act of Cession in 1804.

When the name of James Wilson was said to be connected with these "frauds," it was at once assumed that the connection must involve his name in the fraud associated with the case. An examination of the history of the land companies showed that James Wilson was, January 1, 1795, a subscriber to ten shares in the Georgia Land Company, for which he paid twenty-five thousand pounds.[4] His name appears only as a subscriber among the other subscribers, not among the persons active in the company, whose names are appended to the agreement. These persons were active in

[3] Haskins, "History of the Yazoo Land Companies," Papers of the American Historical Association, p. 36 (62).

[4] American State Papers, "Public Lands," vol. i, p. 141.

securing the necessary legislative action; Mr. Wilson does not appear in any other way in any portion of the records; his name again appears in the lists of subscribers as they were reprinted in the records during the progress of the Georgia claims through Congress. The matter appears again and again; the debates of Congress from 1803 to 1814 contain speech after speech, resolution after resolution, bitter recrimination and partisan charge, detailed statement and discoursive colloquy, but no mention of Mr. Wilson's name; no mention of any action taken by him in the matter in any way. The American State Papers contain the investigation made into the charges of bribery against the Legislature of Georgia; every affidavit is given in full. No slightest allusion to James Wilson either directly or by indirection is made anywhere, in any way. On no page of the public archives of his country stands on record one statement which any friend of James Wilson need desire to erase. The other men mentioned by the anonymous writer do appear; James Gunn, Wade Hampton, Zachariah Cox, were all active and influential in the matter. Must we then simply shift the burden of the sin to their shoulders, leaving the recorded evil as it stands? Were these men, more or less associated with the finest minds, the purest characters, of the time "corrupters" and "bribers"? At a superficial glance it seemed so, but as the story spread upon the public archives of the United States, the Annals of Congress, the biographies of the men of the day, is slowly unfolded, the conviction is forced upon the mind that not only was James Wilson unconnected with any evil, but that the evil itself had been so exaggerated, so colored by the violent passions and the prejudiced minds of the time, that even history has been led astray, and a stain left upon the annals of the early days of the country which should have been long since removed.

To write the whole story of this remarkable series of events would be to examine and perhaps to reshape a very long chapter in the early history of the country, extending

from 1789 to 1814. It is only desired here to give a brief view of the facts as they stand upon the records, and which as they stand seem to show clearly, and without need of assigning fraud or any other ulterior motive, the reasons which moved the foremost men of the time to enter upon these great enterprises. There were many of these undertakings, but the one to which our attention has been particularly called, as the one to which James Wilson subscribed, is known as the Georgia Land Company.

The State of Georgia had a vast territory not now included in the State limits and then called informally the western lands, uninhabited save for a few straggling settlers and the original red men. Her treasury was empty, and she had incurred heavy debts to those soldiers who had been employed in defending her frontiers against the Indian enemy,[5] who were ever ready for an attack. "The people were unable to pay heavy taxes and were unwilling to pay any. The State currency was greatly depreciated, and the only hope of relief was in the sale of the Indian lands."[6] The boundaries were uncertain, the title more uncertain still. In regard to the boundaries the custom seems to have been to claim as much as possible and get as much as might be. Title to the territory was claimed by England, Spain, Georgia, the United States, and by the scanty and scattered settlers who disputed it with the Indians.[7] At the time most of the land companies were formed, almost any of the claimants might come to be the strongest by a slight turn of the wheel of fortune. The boundaries were extensive, the settlers feeble, the Indians aggressive and cruel. These latter had a much to be reprobated attachment to their pleasant lands and a singular dislike of those who were taking those lands from them. The peaceful settlers needed protection both from the white border ruffian and the red burner of the

[5] Annals of Congress, 1803-4, p. 969.

[6] Smith, "History of Georgia," p. 170.

[7] American State Papers, "Public Lands," vol. i, pp. 34-35, 99-102, 132-140; Annals of Congress, 1803-1814, Debates in Congress on the Georgia Claims.

settlement and the clearing. "No one could say what was the value of the Georgia title, for it depended on her power to dispossess the Indians, but however good the title might be, the State would have been fortunate to make it a free gift to any authority strong enough to deal with the Creeks and Cherokees alone." [8]

An empire stretched beyond the barriers then set by the wilderness and the savage; how should that empire be opened to the white man and to civilization? That problem had presented itself clearly to those who, during the debates of the Constitutional Convention, had planned for the future of America. Mr. Wilson himself had said in that convention, "When I consider the amazing extent of the country, the immense population which is to fill it, the influence the government we are to form will have, not only on the present generation of our people, and their multiplied posterity, but on the whole globe—I am lost in the magnitude of the object." [9] To such men as Wilson it was not only the physical grandeur of the great spaces which were to be filled with an overflowing population, but the grandeur of the example that was to be set to the whole of humanity, of an independent, intelligent and happy race, living unhampered by the old forms of government, and growing up to the full stature of a free people. To such as he the opening up of a vast wilderness, filled only with the roaming, scattered bands of the aborigines, and the wild beasts of the forest; the throwing open to the sunshine of the dark and dismal spaces of swamp and fen, the opening of the great waterways for the passage of the hardy settler with his schoolhouse and his church, was the patriotic preliminary to the greater—the all-important—work of the building up of a new world which should be in itself so happy, so enlightened, so favored by its environment, so blessed by its institutions, that all men all over the world would be the better and the happier because of the example it would afford.

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[8] Adams, "History of the United States," vol. i, p. 303.

[9] Elliott's Debates, vol. v, p. 239.

It was in a spirit such as this that men like "Washington, Franklin, Gallatin, Patrick Henry, Robert Morris and James Wilson [10] engaged in what has been called 'land speculation.'" It was land speculation to which they were not only invited, but urged by the government to which they were devoted. The Congresses of the several States, and the Congress of the United States, were all engaged in formulating plans by which they might dispose of the public lands to land companies and to private individuals. In 1790 Alexander Hamilton, "in obedience to an order of the House of Representatives," submitted a report in which he said, "In the formation of a plan for the disposition of the vacant lands of the United States, there appear to be two leading objects of consideration; one, the facility of advantageous sales, according to the probable course of purchases; the other the accommodation of individuals now inhabiting the western country, or who may hereafter emigrate thither. The former, as an operation of finance, claims primary attention; the latter is important, as it relates to the satisfaction of the inhabitants of the western country. It is desirable, and does not appear impracticable, to conciliate both. Purchasers may be contemplated in three classes: moneyed individuals and companies, who will buy to sell again; associations of persons, who intend to make settlements themselves; single persons, or families now resident in the western country, or who may emigrate thither hereafter. The two first will be frequently blended, and will always want considerable tracts. The last will generally purchase small quantities. Hence, a plan for the sale of the western lands, while it may have due regard to the last, should be calculated to obtain all the advantages which may be derived from the two first classes." [11] "Moneyed individuals and companies" were looked to in the first instance for relief from the burdens of debt which had been incurred by both the States and

[10] Haskins, "Yazoo Land Companies," Papers of the American Historical Association, p. 36 (62).

[11] American State Papers, "Public Lands," vol. i, p. 8.

the nation, and for assistance in opening the unsettled lands to occupation and civilization.

With encouragement of such a nature from the government it is not to be wondered at that the thoughts of men turned toward the opportunities presented by the vast tracts of land waiting for opening and improvement. A number of companies were formed under various names, and efforts were made to secure legislation in their favor. Three of these companies, the Virginia Yazoo, the Tennessee Yazoo and South Carolina Yazoo companies, secured a grant of something over fifteen million acres of the western land from Georgia for about two hundred thousand dollars;[12] they claimed that they could, by the terms of their grant, pay for this land in the depreciated evidences of the public debt of the State; the State refused to accept the tender, and repudiated the contract. The company acquiesced in this repudiation of the contract by the State, it appears, for the reason that the currency rose in value and they could more profitably use it elsewhere.[13] The Act was never repealed and no title deeds ever passed under it. But the question of claims was debated in Congress, and it was said that the claimants under the Act of 1795 were willing that those under the Act of 1789 should "share the equity of their claim."[14] In this case the State was able to recede from what it considered a bad bargain by means of a disagreement as to the construction of the contract; it did not, therefore, feel itself driven to the desperate means by which it escaped from the next bargain it entered into with the land companies. But it seems to have here begun that course of the repudiation of its contracts which led to so much mischief later on. In 1794 the land was still unsold, the soldiers were clamorous for money, the treasury was still empty, and there was little hope of replenishing it unless Georgia could realize something from her rather uncertain

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[12] American State Papers, "Public Lands," vol. i, p. 133.
[13] Ford, "Writings of Jefferson," vol. v, p. 324.
[14] Annals of Congress, 1803-4; p. 1162.

interest in those western lands. It was known they were for sale and five companies came forward to buy them. Four of these companies united and agreed to give Georgia five hundred thousand dollars in cash for her interest; the purchasers to take the titles as they were and to get rid of all difficulties and arrange matters with the general government and with Spain and the Indians. These companies were the Georgia, the Upper Mississippi Company, the Georgia Mississippi and the Tennessee Land Company.[15] This offer was accepted, and the Act of 1795, hereafter referred to, was passed. "These companies were not all Georgians, but a company of Georgians offered seven hundred thousand dollars for the property on somewhat different conditions."[16] This offer of the seven hundred thousand dollars (two hundred thousand more than that of the four companies) has been given as a complete proof that the Legislature was bribed to pass the Act in favor of the four companies. Mr. Haskins, who looked carefully into this matter, says, "Wereat was the man who proposed to buy at the same time the other companies bid." "His security was thought insufficient, and the whole plan was regarded as really a scheme on his part to pay down a fraction of a cent an acre for the chance to sell at a profit in the course of a year. The fact that each of his later proposals was made after the arrangements of the others were well advanced gives color to the suspicion that his real design was to force the other companies to buy him off."[17]

In December, 1794, an Act to grant these lands to the land companies mentioned passed the Legislature of Georgia, but Governor Matthews vetoed it on December 29th.[18] A committee was appointed to confer with the Governor, and a second bill, framed to meet his objections against the first

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[15] American State Papers, "Public Lands," vol. i, pp. 133-134.

[16] Smith, "History of Georgia," pp. 170-172.

[17] Haskins, "Yazoo Land Companies," Papers of the American Historical Association, p. 23.

[18] Stevens, "History of Georgia," vol. ii, pp. 467-470.

bill was passed and received his signature January 7, 1795.[19]

Speaking of this incident the recent writer who has attempted to revive the rancors of former days says, "The Governor, brave, ignorant, old George Matthews, 'the hero of Kanawha,' was persuaded by its lying caption to sign what he believed to be an Act to pay old soldiers their arrears and to strengthen the frontiers. No stigma ever attached to his name.[20] As the Governor carefully read the bill on its first appearance and vetoed it; as he subsequently gave, in a very elaborate message to the Legislature, his reasons for signing the second bill, showing a most intimate acquaintance with all its provisions; as he very bitterly resented in the same message the slanders which were hurled against him, and as he finally went to live practically in exile, almost broken-hearted because of the unfounded and unjust attacks upon him, the paragraph quoted is amusing in its pseudo pathos and mistaken inference. The Governor's message is in part as follows:

"It is a matter much to be regretted (considering the unfavorable light the Act for disposing of our western territory has been viewed in) that the spirit of party resentment and personal reflection should have run so high in many instances. The public mind has been inflamed by unfair representations, and our newspapers have teemed with personal abuse and invective. This I remark from having experienced the public slander. Endeavors have been made to calumniate my character by false reports, such as 'that the motives which induced me to give my assent to the second Act proceeded from private interest, regardless of the sacred duty I owed to the station I filled, and the rights and interests of my fellow-citizens.' Conscious of the purity of my intentions and supported by the justice and integrity of my actions, I have treated with silent contempt these base and malicious reports; and I now defy the blackest and most

[19] Stevens, "History of Georgia," vol. ii, p. 473.

[20] *The Independent*, March 16, 1906.

persevering malice, aided by disappointed avarice, to produce one single evidence of my ever having been interested in the sale to the amount of one farthing." [21] This is the pathetic message of the man "against whom no stigma ever rested!" He was innocent, as were others; he was reviled, as were others, but because one of these others is honoured above his fellows by men who understand his character, the slanders are revived against him, while "brave, ignorant, old George Matthews" finds himself at last exonerated! In this same message he gives a long account of the causes which led him to give his approval to the second bill, saying at the end, "But when it appears that three of the most important objections I had made to the first law were removed, I think there is no man of cool, dispassionate reflection that would have refused his assent to it for any reasons short of a clear proof of corruption in its passage through the Legislature, and *no such information ever came to my knowledge.*" [22]

January 26, 1795, the Governor issued his proclamation, granting the designated tract to these four companies.[23] The purchasers very naturally, having paid large sums of money for their purchases, proceeded to dispose of some of their holdings, considering the purchase completed by the solemn act of the Legislature. But in this same year conditions changed. The United States opened a land bureau for the sale of the northwestern lands,[24] which were to be sold for "two dollars an acre, or as much more as they would bring." The title of the State became much stronger by reason of the settlement of claims against it through the treaty with Spain, concluded in October, 1795. In 1790 the proposal had been to sell the public lands of the United States, with a good title, free from dispute, for thirty cents an acre.[25] This is to be assumed as the highest price Alexander Hamil-

[21] Stevens, "History of Georgia," vol. ii, pp. 482-484.
[22] Stevens, "History of Georgia," vol. ii, p. 483.
[23] Stevens, "History of Georgia," vol. ii, p. 477.
[24] Story, "Laws of the United States," vol. i, p. 421.
[25] American State Papers, "Public Lands," vol. i, p. 9.

ton, who formulated the proposal, believed he could obtain. The price of 1796 seemed very high in contrast. In fact, the sum realized was expected to be much reduced by reason of the expenses of the land office. Georgia sold her lands in 1795, without guaranteeing title and without expense to herself. The United States gave a good title and was under heavy expenses.

The sum which had seemed large, in view of the poor title Georgia could give and the small and uncertain payments she had hitherto been able to obtain for the lands, began to look like a bad bargain. "Disappointed avarice," to use the language of Governor Matthews, who it may be assumed was referring to the members of the defeated companies, before referred to, was ready for its revenge, for a possible relief to its disappointment, for if the Act could be rescinded they might yet succeed in their designs. Senator Jackson, of Georgia, resigned his seat in the Senate and conducted a campaign which has been sufficiently characterized by the phrases used by Governor Matthews. Charges of bribery and corruption were freely and violently made; there can be no doubt that they were sincerely believed by the masses. The Legislature convened, a rescinding Act was passed February 13, 1796, and thereupon ensued the theatrical scene of the burning of the offending Act. The picturesque features of the scene not being sufficient for the excited fancy of the reporters, they later added that the fire used was obtained "from heaven" by means of a burning glass. A reason for this seemingly sentimental conduct is given later by Mr. Lyons in a speech before Congress in 1803. In speaking of this matter he said, "The Legislature of Georgia, in or about the year 1795, offered these lands for sale, and did actually by an act of their Legislature, dated seventh of January, 1795, and by Executive acts founded thereon, sell and convey by deed their claim and title to about forty million acres of that territory, for which they received the compensation agreed on. The succeeding Legislature, it seems, did not like the bargain their predecessors had made. They thought

they did not get price enough for the land, or they thought if they did, they put too much money in their own pockets. They, after declaring the sale null and void on account of its being effected by fraud, bribery and corruption, endeavored to erase and destroy every evidence of the transaction. The proceedings of the Legislature of Georgia on this subject carry on the very face of them a doubt of their ability to do away with the title given in 1795, when they endeavor to perplex the holders of it by the destruction of the records." [26]

In the light of this nearly contemporary recital the facts of the case begin to take on a different hue. The sensational procedure of erasing the legislation from the statute book, the burning of the record, the violence of the passions aroused in order that all this might be done and yet take on the appearance of legality, all are shown as parts of a concerted action, by force of which the State could attempt to annul a contract and rescind a bargain her legislators desired to retreat from.

At the time of the sale the people of Georgia knew the actual condition of the lands. Some years later, when the claims to this land were being debated before Congress, the country was described by various speakers as being one of the most beautiful and delightful on the globe. But as to the facts on this aspect of the question we have the testimony of Mr. Lyons, who came from that section of the country and knew whereof he spoke. Eight years after the sale of 1795 he gives a vivid description of that country which we are asked to believe was a sort of earthly paradise which the State of Georgia had parted with for a mess of pottage. He speaks of it as "a country which is now, and has long been, a harbor for bands of the most desperate robbers and murderers that ever infested any part of North America; who almost weekly rob or murder some of my neighbors on their return to their homes from market." [27] The pioneer

[26] Annals of Congress, 1803-4, pp. 1155-1156.
[27] Annals of Congress, 1803-4, pp. 1156-1157.

who would pay a high price for lands so situated must have had a most adventurous heart!

Congress had watched the proceedings in Georgia with interest. The Indian title to the land had never been extinguished, and the President, February 17, 1795, sent a message to Congress calling attention to the Acts of 1794 and 1795, saying that these Acts embraced "an object of such magnitude and their consequences may so deeply affect the peace and welfare of the United States, that I have thought it necessary to lay them before Congress." A committee was appointed, and a series of resolutions were passed having reference to the infraction of treaties with the Indian tribes, which, with its consequences of renewed warfare with the Indians, and all the horrors of border warfare, was the danger assumed by the Congress to have been meant by the President.[28]

"The primary object and the whole intention to be collected from them (the resolutions) was to prevent the settlement of the country by individuals either by waging war against the Indians, or extinguishing the Indian title; and to prevent a sale by Georgia, except to the United States, of their remaining undisposed of territory; for Georgia still had a large tract of land after the passage of the Act of 1795." [29]

These fears and the belief that the country should belong to the nation kept the matter before the mind of Congress, and April 7, 1798, the President was empowered to appoint a commission [30] to settle land claims with Georgia. He appointed the commissioners December 31, 1799,[31] and on May 10, 1800, another Act was passed granting further powers to the commissioners.[32] Articles of agreement and cession were entered into by the commissioners of the United

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[28] Annals of Congress, 1804-5, pp. 1066-68.
[29] Annals of Congress, 1804-5, p. 1068.
[30] Story, "Laws of the United States," vol. i, p. 778.
[31] American State Papers, "Public Lands," vol. i, p. 92.
[32] Story, "Laws of the United States," vol. i, p. 778.

States and Georgia, April 24, 1802, and reported to Congress by President Jefferson, April 26, 1802.[33] March 3, 1803, the Act of Cession was finally passed by which Georgia ceded to the United States all her claims in the western lands. In this cession was included the land which had been granted by Georgia to the four companies in 1795.[34] February 22, 1803, a commission appointed in pursuance of a clause in the Act of 1803 made their report to the House of Representatives on the claims "made by settlers and other persons" to the lands thus ceded.[35] In this report the several titles to the lands were fully set forth, as were the Act of January 7, 1795; the agreement between the four companies and the State, dated January 10, 1795, and the proceedings of the Legislature which repealed the Act of 1795. The proceedings before the State Legislature of Georgia are transcribed in full in the report of the commissioners to Congress, and contain the affidavits upon which the charges of bribery rest. They are all thus spread upon the pages of the public records of the United States.[36] They contain all that could be brought before the Legislature by the utmost exertion of political energy. What men thought of them a few years later may best be shown in the words of Mr. Root, a member of Congress in 1803-4.

"It is further insisted, that the grant of 1795 was fraudulent—of course, that it is void *ab initio*. The abominable fraud, the gross and odious corruption, which is said to have been practiced by and upon the members of the granting Legislature of 1795, have been depicted in the most artful and detestible colors. But if I were to admit for a moment that the motives of a Legislature can be questioned in order to nullify their acts, I should extremely doubt whether that abominable corruption did even exist to the extent alleged. Where, let me ask, is the proof of its existence? I can find

[33] American State Papers, "Public Lands," vol. i, pp. 125, 126.
[34] Story, "Laws of the United States," vol. ii, p. 893.
[35] American State Papers, "Public Lands," vol. i, pp. 132-150.
[36] American State Papers, "Public Lands," vol. i, pp. 132-150.

it nowhere except in *ex parte* affidavits, taken before no one knows whom, and sworn to by persons equally strangers to us. Being voluntary affidavits, the deponents felt perfectly secure from the pains and penalties of wilful and corrupt perjury. If those legislators were so base and impure, why have they not been arraigned to answer for their crimes? We have heard of no prosecution against them for the bribery and corruption. Instead of jails, gibbets and infamy, they have been rewarded by the continued confidence, not only of the people, but of the Legislature. Several of the members who stand charged with bribery have since been elected by the people to seats in both branches of the Legislature. Several others have since been appointed by the Legislature to seats on the Bench of Justice, and one other has since been appointed by a legislative act a trustee of the University of Georgia." In February, 1805,[87] Mr. Root said :

"Sir, the honours and preferments retained by and conferred on so many of those persons charged with the bribery, leads me to believe that there were causes unknown to me which led to the uneasiness on the part of the people of Georgia, with regard to the sale of 1795, and led to the attempt to resuming the right to the lands in 1796."[88]

"No men stood higher in Georgia than the men who composed these companies and the members of the Legislature who made the sale, and no men were in higher repute than some of these in an aftertime," says Mr. Smith in his "History of Georgia." Mr. Stevens, who wrote in 1859, and who, like the other historians mentioned, believed the popular report of the proceedings, although that belief came into conflict with the facts which he reports, says:

"Many of the persons thus branded were subsequently received into public favor—one having been since the Act elected President of the Senate; four, members of the Senate; four more, members of the House; two, elevated to the

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[87] American State Papers, "Public Lands," vol. i, pp. 132-150.

[88] Annals of Congress, 1804-5, pp. 1095-1096.

Bench, as Judges; one, made a justice of the peace; and one, appointed a trustee of the University of Georgia." [89]

It should be needless to state that in all this matter not the faintest hint of any connection with the transaction at any time, in any way, legitimate business or illegitimate bribery, is shown of Mr. Wilson. His name does not once occur in the affidavits above mentioned. In all these public records or proceedings he is simply out of connection with all this slander, and whatever truth may have been mixed with the slander. Twice it may be assumed he is mentioned in the debates of Congress, but only by indirection and in the midst of violent partisan recriminations. The gossip of the time did undoubtedly use his name. If gossip is to be crystallized into history Wilson and Washington will go down together; the columns of the Philadelphia papers of the time need only be cited to establish how evil were their characters, how infamous their actions, how foolish their policies.

While it is not necessary in order to vindicate Mr. Wilson's character to show that the charges against the four companies are largely, perhaps entirely, groundless, it is due to those whose names have been connected with the charges of bribery to repeat the clear and impartial statement in regard to the inadequacy of the price paid for the lands made by Mr. Holland. After stating that he had formerly been greatly prejudiced against the Act of 1795 and the transactions connected therewith, he stated that he had had occasion to examine the matter more closely, and that this examination into the facts had caused him to reconsider his decision; he believed that many of the members might have acted from impure motives, but not to the extent alleged.

"There are many causes, however," he said, "if we will take the trouble to examine them, which will in a great measure account for the extraordinary acts of both these Legislatures, and if their acts can be accounted for without attributing fraud to the one and tyranny to the other, that

[89] Stevens, "History of Georgia," vol. ii, p. 490.

portion of charity which we are bound to extend to all mankind will impose upon us the most favorable construction. In order to understand these transactions it will be necessary to inquire into the estimated value of land, in the State of Georgia, to which the Indian claim had been extinguished and also the estimated value of lands in question to which the Indian claim had not been extinguished for years antecedent to the disposal of them by the Act of 1795; and, also, inquire whether any external causes subsequent to the Act of 1795 produced a different conception relative to the value of these lands. A knowledge of these subjects may be useful, and enable us to judge more correctly and more favorably on the motives of either Legislature. The people of the State of Georgia, as well as the Legislature of the State, for years previous to the passing of the Act of 1795, had set a low value upon their vacant lands—lands lying contiguous to the settlements to which the Indian title had been extinguished—lands lying this side of the Oconee. I am credibly informed, and if my information is incorrect, let the gentleman from that State correct me, lands had been sold in 1792-93-94 for a cent an acre; sold for a sum only contemplated to indemnify the State for the expense incidental to making titles. And as to the lands in question, their estimated value will be best known by adverting to their legislative acts; their Legislature for years had been attempting to sell these lands; in 1787 a large portion of them was offered to the United States for $171,428; and in 1799 about twenty-five million of acres was actually sold for a little more than $200,000 to two companies, one called the South Carolina, the other the Virginia Yazoo Land Company; and in this case the land was sold on a credit, and the terms of the sale not well understood; the purchasers contended that the payments could be made in paper bills; but the State insisted for specie; this not being complied with, the titles were not completed by the subsequent Legislature. In 1795, the quantity of land was estimated at thirty million acres; the terms were cash; and the sum, five hundred thousand

dollars, which was paid, and the titles executed, subject to many claims derived from Spain and Great Britain, and subject to the Indian title and to the claim of the United States, as well as the claim of Spain to a part of this territory, and also subject to the sale previously made by the State in 1799 to the Virginia and South Carolina companies. It was under these circumstances and conflicting claims to the lands in question that the Legislature in 1795 sold this land. Sir, I shall not justify the conduct of any member that composed this Legislature, and I admit that all those members that were partners, or took any consideration for their votes, acted imprudently, and probably corruptly. But it is possible that even Thomas Rayburn, who appears in the most unfavorable point of light, having taken, it is said, $600 for his share of the land, or for his vote (for there is no legal proof) might believe that the State was not defrauded; he might believe that $500,000 that the company was giving for the claim of Georgia for the lands in question was more than the claim was worth. The price for which unappropriated lands had been sold, the price the State had offered to take, and the price for which Georgia had previously sold it for, authorized this belief; and that this was his belief, may be inferred by his taking $600 for seventy-five thousand acres, being one-quarter per cent. less per acre than the State had sold it for; for it seems admitted that he had his choice to retain his share or receive the money; his choosing a less sum than the public sold it for is an evidence of the value he set upon it, and a confirmation that he thought the land well sold. . . . What was the property disposed of? Was it a country which was needed for the cultivation of her citizens? No, sir; Georgia had independent of this more vacant lands than fell to her share, or than she could cultivate for generations to come. It was a tract of country remote from her citizens, claimed, as I have before stated, by Spain, by the United States, and possessed by powerful nations of Indians, over which Georgia had no control. It was of no use to Georgia only as an estate for

sale, and she had nothing to sell but a mere nominal title, derived from a dubious construction of her original charter, and for this Georgia received, when in great need of money, $500,000—a much greater sum than it had been previously proposed for or expected to bring. We have now seen the causes which produced this sale under the Act of 1795; let us examine what probably produced the Act of 1796. The deprecated Act passed January, 1795; in the same year an office was opened for the sale of the public lands of the United States; these lands were to be sold for two dollars per acre, and as much more as they would bring. The vast disproportion in the price of these lands, and the price which the Legislature of 1795 of the State of Georgia had sold their lands, could not well be accounted for by the people of Georgia other than fraud. Fraud was suggested—a single suggestion in a case of this kind is sufficient. Nothing is so disgusting as for our agents, especially in a legislative capacity, to sacrifice from mercenary motives our interests, and be guilty of a breach of trust. Suspicions will now be admitted as full proof; the torrent went on; the belief became general that by fraud the Legislature of 1795 had bartered off in the most fraudulent manner millions of acres of the realized property of the State. Under this ideal impression, occasioned in a great degree by the causes I have mentioned, the people of Georgia were misled, and under this impulse the Legislature of 1796 proceeded. . . . I have mentioned these circumstances to show what it was that made the act of Georgia of 1795 so obnoxious to the people of that State, and I am strongly induced to believe that had it not been for the price that the general government set upon her lands in 1795, we should have heard but little concerning the corruption of the Legislature of the State of Georgia in 1795, nor ever have heard of the rescinding act of 1796." [40]

It was beyond the power of the persons concerned in the drama of development taking place in 1795-6 to take this

[40] Annals of Congress, 1804-5, pp. 1139-1142.

just and impartial view of the matter. The Act was rescinded, the companies deprived of the land for which they had paid, and which, in many cases, they had resold, and many of the participants were financially ruined, although the State placed the purchase money which had been deposited, in the treasury to be drawn against by the members of the several companies, and a portion of this money was actually withdrawn.

It may be interesting to follow the history of the claim to its final settlement in 1814. Under the Act of Cession, which, as we have seen was passed in 1803,[41] the United States agreed to set aside a large quantity of land for the purpose of satisfying claims in the territory, and thereupon arose a controversy which continued until 1814, in regard to the status of the "Yazoo claimants." The claimants for the ceded land were numerous. As has been noted, the rights of actual settlers within the territory had been confirmed both as to Great Britain and Spain, by the Spanish treaty of October 17, 1795.[42] There remained as chief claims, British grants to persons not actually settled on the date of the treaty, British and Spanish incomplete grants; claimants who had settled without any evidence of title; a company of military adventurers, mostly from Connecticut, and lastly, the claimants under the Acts of Georgia of 1789 (never repealed) and 1795. Most of the claimants under the latter Act were persons or companies who claimed as innocent purchasers from the prior claimants, and who declared they could not be affected by any fraud, if fraud there were in the prior proceedings. Many of these were New England companies, or individuals. John Randolph, the chief opponent of these claimants in Congress, belonged to that class of politicians who believe that devotion to their section involves hatred to all that lies beyond its borders. He had an especial hatred of the New England Yankee, or as Haskins says, "his chief political motive appears to have been hatred of Madi-

[41] Story, "Laws of the United States," vol. ii, p. 893.

[42] American State Papers, "Public Lands," vol. i, p. 132.

son and the Northern Democrats." For twelve years his deep hatred and bitter invective were displayed in the House whenever the subject of the Georgia lands came up. He was answered time after time, by such men as have been quoted —men who were calm in their argument, and who produced facts to support their cause. Randolph repeated his charges over and over again, but introduced no new evidence to refute that which had been offered in rebuttal.[43]

While these debates were going on in Congress the case of *Fletcher* v. *Peck*,[44] came before the Supreme Court of the United States for decision. By several conveyances the title of the Georgia Company to a portion of the land conveyed in the Act of 1795 was vested in a person by the name of Peck. On the fourteenth of May, 1803, Peck bargained and sold his title to Fletcher, covenanting among other things that the title of the premises so conveyed by the State of Georgia in the Act of 1795 to his predecessor in title had been "in no way constitutionally or legally impaired by virtue of any subsequent Act of any Legislature of the said State of Georgia." Fletcher sued Peck and the third count of his declaration set forth that the covenant had been broken because of the rescinding Act of 1796. If the rescinding Act was valid there had been a breach of the covenant. Marshall decided that a State could not repudiate its own grant; that the Act of 1796 in which Georgia had attempted to do so was null and void, and consequently that the plaintiff had failed to show a breach of the defendant's covenant. When the case was argued the land which was the subject of the controversy was not in possession of either party, and the decision did not put either party in possession. It did, however, affect the question before Congress. It amounted to a decision by the Supreme Court that those who claimed title under the Georgia Company should have their proportionate part of the proceeds from the sale of the lands set apart to satisfy claimants by the Act of 1803.

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[43] See Annals of Congress, Debates on the Georgia Claims, generally.

[44] Cranch, United States Reports, 87.

March 14, 1814, an Act of the United States gave to these claimants their long contested rights.[45] The third section provided that "the respective companies hereinafter enumerated" should receive "certificates of stock, not bearing interest, and expressing on their face that the same are payable out of the first moneys in the Treasury of the United States, arising from the sale of public lands in the Mississippi territory, after the money due to the State of Georgia and the expenses of surveying such lands have been satisfied." The next paragraph mentions the Upper Mississippi Company and the share to be paid to it; the next the Tennessee Company and its due share; the next the Georgia Mississippi Company and its share, and last the Georgia Company, to which was awarded "a sum not exceeding in the whole two millions two hundred and fifty thousand dollars." Thus ended in a national act of justice the long drama which had been played upon the public stage for nearly fifteen years. The Supreme Court of the United States, and the Congress, had both upheld the rights of the claimants under the original purchasers; but the dramatic incidents; the violent speeches; the charges against the Legislature, were remembered; parts of the history of the event were chronicled by writers of state and national history, but many of the real facts of the case faded out of public memory, and the few later writers of monographs, perhaps because they told the facts more calmly and less picturesquely, failed to attract attention once more to the subject.

It has been impossible, within the limits of this paper, to do more than state the main facts of this intricate yet very interesting bit of history. It might have been an easy task to simply state that Mr. Wilson's name was never connected with the alleged frauds in any authentic public record. It would scarcely have been worth while, however. Mr. Wilson's fame is so well established, all who have studied his works or investigated his character have come from the study or examination with so high a veneration, so deep a

[45] United States Statutes at Large, vol. iii, p. 116.

respect, for both the mental and moral qualities of the man that their praise, so measured to their own minds, in view of the worth of their object, seems almost subject to the reproach of exaggeration. His fame is safe; it rests upon his work, his life, his thought, and these are open to the view of all men; there is nothing concealed, nothing mysterious. We can well afford to ask simply that anyone who would judge James Wilson capable of any action dishonorable in itself or disadvantageous to his country, will take the trouble to examine the record of his life, and make themselves acquainted with his thoughts. No other or further reply will be necessary.

But in regard to these transactions of the Georgia Company it is a different matter. They have become obscured by time; they have not been treated with that fullness and fairness that so important an episode merited. From 1789 to 1814, in one way or another, the matter was before the country. The final action of both Court and Congress did justice to those who had been injured. But in their manner of dealing with the subject few historians have done it justice. None, save Mr. Smith in his history of Georgia, have attempted to free the men who took part in it from the obloquy which has covered them; to free the Legislature of Georgia from the reproach that has hung over it, blotting the record of that State with a story of shame. It has not seemed to be a matter of importance hitherto, but if men can be found who are willing to scan the pages of history in order to discover if on those pages there can be found the record of an ancient sin, and without stopping to inquire as to the truth or error of that record, are to use it for the slaying of the reputations of honored men, then there is a cause for examination; then there is a reason for renewing the quest for truth that stopped too soon in the old days. Too long there has been left an unverified slander on the Legislature of Georgia. Too long have honorable men like Matthews and Pendleton and Morris rested under a dishonorable imputation. A partially investigated truth, obscurely

reported. accepted without due investigation. has no place upon the pages of any history. Such a half truth has often worse effects than the palpable error which can be traced and refuted. Unless written with an absolute devotion to truth, history will fail to fulfil its object and sink to the level of a feeble fiction. It is for the interest of those upon whom the slander and obloquy did really fall that the true story of the transaction should be told. It is not from the pages of history, however, that any stain is thrown upon the name of James Wilson. To do this it was necessary to scour the pages of the irresponsible and fleeting literature of the time; to read into the records that which was not found there. James Wilson, as has been said, was interested in these companies; after all that has been said such interest does not seem unpatriotic or dishonest. He invested his money; he lost all that he had invested; he died absolutely without worldly wealth, poorer than when he came to America in the days of his youth. But as then he had been rich in intellect, in learning, in energy, so he died; richer in intellect, for he had used that intellect for the benefit of his adopted country; richer in learning, for his learning had been given to great uses; richer still in that character into which his energy had been transfused; a character too deep, too broad, too generous, too widely known, too deeply loved, for any breath of slander, however virulent, to injure.

M. C. Klingelsmith.

THE COURTS OF PENNSYLVANIA IN THE EIGHTEENTH CENTURY PRIOR TO THE REVOLUTION.

In 1701 William Penn was called back to England to defend his proprietorship. Before his departure a general revision of the earlier legislation was undertaken at the sessions of the assembly held at New Castle in 1700 and at Philadelphia in 1701. The acts there passed, one hundred and fourteen in number, seem, in a sense, to have been regarded as supplying the previous legislation and were passed with the expectation of being presented to the privy council for approval, as required by the charter. In fact, when the board of trade inquired of Penn, on his return, as to whether the laws received from him were a complete body of all the laws of the province, he replied that he believed they were the present body of laws, and it will be noticed that the digests of the eighteenth century begin their compilations with the Acts of 1700.[1]

Among these acts was one of October 28, 1701, entitled "An Act for Establishing Courts of Judicature in this Province and Counties Annexed."[2] Its origin was as follows: Edward Shippen, for the two previous years chief justice of the provincial court, and John Guest, the then chief justice, both members of the council, brought into the assembly on October 7th, a bill for establishing the courts, which was "unanimously rejected." Some few days after, David Lloyd, who was not then a member of either council or house, proposed a bill which was voted to be adopted with amendments, and Richard Hallowell and Isaac Norris were appointed a committee to draw up the bill, with the amendments. The bill met with no apparent opposition in the council. Without repeating its provisions in full, which would be tedious, it may be said by way of summary that

[1] II Stat. at Large, 462.

[2] II Stat. at Large, 148; Charter and Laws, 311.

the act provided for the holding of the "County Courts or Sessions" at stated periods, three justices to constitute a quorum, with jurisdiction in civil and criminal matters, capital cases excepted. Maritime affairs, not cognizable in the admiralty courts, were to be tried in a special manner. The county courts also received equity powers, with the right of appeal to the provincial court. The provincial court was to consist of five judges, appointed by the governor, three of whom were required to sit twice a year in Philadelphia, and two, at least, to go on circuit through the counties to try capital cases and serious crimes and hear appeals from the county courts. The practice on writ of error was regulated, and provision made for appeals to the king. The powers and duties of the orphans' courts were also better defined and the forms of certain writs prescribed; all former laws relating to the courts were repealed.

In its main outline the act presented the system of judicature then, and afterwards, recognized by the colonists as the most convenient for Pennsylvania, but in the form adopted, it did not prove acceptable to the advisers of the crown. Penn himself seems, on second thought, to have found some objectionable features in the act and desired that it might not be confirmed but sent back to be amended. The lords commissioners for trade and plantations reported that the act, "so far from expediting the determination of law suits," would, as they conceived, "impede the same," and, accordingly, the act was formally disallowed and repealed on February 7, 1705, by the queen in council.[8] One of the objections that occurred to the minds of the English lawyers was to that clause which directed that the practice, while following that of the common pleas of England, should keep to plainness and verity, and avoid all "fictions and colour in pleadings." A doubt was entertained as to whether this might not preclude an action of ejectment. In this they were not far from the real purpose of the draughtsman of the act, as would appear from a debate in the provincial council in December, 1704, upon a petition

[8] II Stat. at Large, 440.

by Thomas Revel, the plaintiff in an ejectment, who complained that his case had been put off for nearly three years. John Moore, counsel for the plaintiff, and David Lloyd, for the defendant, being summoned before the council, Lloyd boldly argued that that method of trial being fictitious, was repugnant to the law of the province.[4] Lloyd, however, was clever enough at a later day, to use the action of ejectment with success in the Frankfort Company's case, which will be referred to hereafter.

The repeal of the Act of 1701 left the administration of justice in a confused state. There had been some debate in the session of the assembly of 1705 upon the subject of courts, but the repeal of the act was not known. Upon receipt of the order in council, Governor Evans called the assembly in special session, in September, 1706,[5] and presented to that body an act for establishing courts, drawn up, it was said, by some practitioners therein. The assembly, however, requested that the matter be referred to the new house, which met in October, 1706, and accordingly at the following session this was the first matter under discussion, the governor laying his bill before the house with his opening address. The assembly, however, had other views and presented them in what is described as a "long and tedious bill," which, on being read in council, was found to disagree very widely from the plan proposed by the governor's advisers.[6]

We have not the text of these rival bills, which brought about a complete deadlock between the governor and the house, but as far as can be ascertained from the respective criticisms, the house objected to the governor's bill as tending to increase the power of the governor, council and provincial judges at the expense of liberty (there was a provision for a court of equity to be held by the governor). While, on the other hand, the governor attacked the assembly's bill (undoubtedly the work of David Lloyd, the

[4] II Col. Rec., 185, 19/11/1704.
[5] II Col. Rec. 261, Sept. 16, 1706.
[6] II Col. Rec., 271, 14/9/1706.

speaker), on the ground that it went into matters of practice at great length, which ought to be settled by rule of court; that it provided for the removal of the judges on address of the assembly; that the provision for the salaries of judges was utterly insufficient; that there should be a separate court of equity held by the governor and council and not by the county courts; and that the provision applying the fines and forfeitures to the support of the courts infringed on the rights of the proprietor. It is apparent that governor and assembly were struggling for the control of the courts and in view of the expected surrender of the government to the crown, both sides were equally anxious to establish their position before that event.

Conferences were held and bitter language used, the matter ending in a personal controversy between the hot-headed young governor and the equally fiery speaker, when the latter declined to rise when addressing the governor at one of these conferences. The assembly then proceeded to impeach James Logan, the secretary of the province, charging him with attempting to subvert the charter and set up arbitrary government. The governor, having twice adjourned the courts pending the discussion and now despairing of reaching a conclusion, issued an ordinance, by authority of a clause in Penn's charter, for the establishment of the courts.[7] In this ordinance the provincial court is first called the "Supreme Court" of Pennsylvania. The assembly prepared a bitter remonstrance against the ordinance and adjourned.

Under this ordinance, which embodied the undisputed features of the proposed bills in a clear and concise form, the courts acted during the remainder of Evans' and the first two years of Gookin's administration, until, in 1710, tired of quarrelling over non-essentials, a court act was passed.[8] By this act a court, called the "Supream Court of Pennsylvania," was established, consisting of four judges appointed by the governor, two to constitute a quorum, with

[7] II Stat. at Large, 500.

[8] Feb. 28, 1710-11, II Stat. at Large, 301.

power to hear appeals at law or in equity. The jurisdiction and practice of the quarter sessions and common pleas were elaborately defined and Governor Evans' ordinance was followed in the provision that all capital offenses should be tried before commissioners of oyer and terminer specially appointed for the occasion. This long, complicated, but interesting act would seem to have aimed at establishing a complete system of legal practice peculiar to the province, and in this respect it may be regarded as expressing the views of David Lloyd's party. By a fee bill adopted the same day, the chief justice was allowed thirty shillings and the other justices twenty shillings for every day they sat in court.[9] Both of these acts were repealed by the queen in council on February 20, 1713, by advice of the solicitor general, Sir Robert Raymond, who was of the opinion that the practice provided would multiply trials at law in plain cases and make proceedings in law and equity insufferably dilatory and expensive.

The assembly had, however, hit upon a method of preserving its legislation, temporarily at least. Under the charter, all laws were to be submitted to the council within five years of their enactment. The colonists took as much time as they possibly could before submitting the acts, and, as a result, the acts generally remained in force nearly five years, and when the assembly was notified of their repeal, new acts on similar lines were passed. Against such tactics the Committee on Trade and Plantations vainly protested. During the intervals between the repeal of the old and the passage of the new court acts the governor maintained the courts either by special commissions to the members thereof, or by general ordinances. The latter method the assembly regarded as an infringement on their rights.

One act did succeed in obtaining favorable recommendation, that of March 27, 1712-13, relating to the organization of and powers of orphans' courts, a comprehensive statute which defined the duties of that court in relation to the estates of decedents, and the care of the estates of minors,

[9] II Stat. at Large, 331.

and became the basis of all subsequent legislation extending and strengthening the jurisdiction of that admirable tribunal.

It would take up too much space to go over all the acts that fell before the criticisms of the council. One, that of May 15, 1715,[10] regulated the taking of appeals to Great Britain and required the appellant to give recognizance in double the amount of the judgment. The objection to this act was that there was no sum limited for which an appeal might be brought, as provided in the instructions to the governors of all the plantations, but notice of this repeal does not seem to have reached Pennsylvania, and the act was printed as in force in all revisions of the laws down to the revolution. The first definite reference to these appeals is in the commission of William and Mary to Governor Fletcher, which limited appeals to cases involving more than three hundred pounds. Additional instructions were sent to the respective governors in 1726, directing the suspension of execution pending appeals, but there is little light to be thrown on this subject from our own public documents. In 1718 two murderers, Hugh Pugh and Lazarus Thomas, attempted to gain a reprieve by an appeal to the king,[11] but the council ignored their petition on account of the notoriety of their crimes. The case of *Fothergill* v. *Stover*, 1 Dall. 9 (1767), involving the admissibility in evidence of a letter from the secretary of the land office to a deputy surveyor, is said by the reporter to have been affirmed on appeal to the king. It is interesting to note, that to the appeals from the various provinces and from the Channel Islands is to be traced the jurisdiction of the Judicial Committee of the Privy Council. The standing committee for trade and plantations, constituted in 1667, was by an order of 1691, directed to hear appeals and report thereon to the king in council. Few cases came before the committee at first, but gradually their proceedings took on the form of a judicial tribunal, the judgment of the members became a

[10] III Stat. at Large, 32.
[11] III Col. Rec., 30, May 8, 1718.

judicial decision, and the adoption of their report a *pro forma* matter. At this early period, however, their decisions are but occasionally noticed in the English reports.

The attempted appeal of Pugh and Thomas was based on the fact that seventeen of the grand jury which had indicted them and eight of the petty jury who found them guilty were Quakers who had qualified by affirmations instead of oaths. This brought to the front a difficulty that had long troubled the colony. The conscientious scruples of the Quakers against judicial oaths had been taken advantage of by their opponents of other denominations, led by Colonel Quarry, to drive them from office and lessen their power. An order had been procured from Queen Anne enjoining the administration of oaths to all persons willing to take them, an order which the Quaker justices were loath to enforce, while the justices of the church party declined to administer affirmations, lest they should mistake the sincerity of the affiant's religious scruples. Constant friction and mistrials resulted from this state of affairs, and more than one act was passed on the subject only to meet with technical objections in England.

The popularity of Governor Keith enabled him to execute a remarkable coup in the passage of the Act of May 31, 1718,[12] which permitted affirmations by such as conscientiously scrupled to take an oath, but at the same time restored much of the rigorous criminal code of England, which the humanity of Penn had prevented from being put in force in the province. The sacrifice of the mild code, in return for the right of affirmation, was accepted and the act was approved by the crown.

From this time capital punishment for the greater felonies was rigorously employed, until in 1794, principally through the efforts of Judge Bradford, the death penalty was abolished in all cases except high treason and wilful murder. With the passage of the Act of 1718 the number of appeals for executive clemency steadily increased and the minutes

[12] III Stat. at Large, 199.

of the council are full of such petitions. One of the most curious is the following: [18]

"A Petition of John Remington, Attorney at Law, delivered to the President, was by him laid before the Board and read, setting forth that the Petitioner was unfortunately deluded & drawn into the idle Diversion of performing the Ceremony of making a free Mason, in Order to which a Sport called Snap Dragon was prepared, at which the Petitioner was perswaded to be present; that unhappily some of the burning Spirit used in this Sport was thrown or spilt on the Breast of one Daniel Rees, which so burnt or scalded him that in a few days after the said Daniel dyed; That Doctor Evan Jones had been indicted as Principle for the Murder of the said Daniel Rees, & by a Jury of the County was found guilty of Manslaughter; That the Petitioner was also indicted as aiding & abetting the said Evan Jones, and altho' no Evidence did or could appear to prove that the Petitioner had any hand in the throwing or spilling the said Liquor on the Body of the said Daniel, or was privy to any Design or Intention of doing harm to the said Daniel, or to any other Person, yet the same Jury had brought in a Verdict of Manslaughter likewise against the Petitioner, which if put in Execution would tend to the utter Ruin of the Petitioner, his Wife, and two small children, & therefore humbly praying that the President & Council would be pleased to grant him a Pardon; Whereupon the Board are of Opinion that the Petitioner should be pardoned the Manslaughter aforesaid, and the burning in the hand, which by reason thereof, he ought to suffer; But it being observed that in the Course of the Tryal a certain wicked & irreligious Paper had been produced & read, which appeared to have been composed by the said Remington, who had made the aforesaid Daniel Rees repeat the same, as part of the form to be gone thro' on initiating him as a free Mason; the Board therefore agreed that the Pardon should be so restricted as that it might not be pleaded in Bar of any Prosecution that should hereafter be commenced against the said Remington on account of the said scandalous Paper."

It would seem that with the constantly increasing population, a disorderly element was introduced into the community that rendered stringent measures necessary for the protection of society. In the newspapers will be found complaints against the authorities in England for making the colony a dumping ground for criminals and vagabonds. In 1717 the grand jury present:

"Whereas, it has been *frequently and often* presented by several former grand juries for this city, the necessity of a ducking stool and house of correction, for the just punishment of scolding, drunken women, as well as divers other profligate and unruly persons in this place, who are become a public nuisance to the town in general; therefore, we the present grand jury, *earnestly* again present the same to

[18] IV Col. Rec., 276, Feb. 3, 1737-8. A full report of this affair will be found in the Penna. Gazette, Feb. 7, 1737-8, by which it appears that the parties concerned were not Free Masons, but practical jokers.

this Court of Quarter Sessions, desiring their immediate care; that those public *conveniences* may not be longer delayed, but with all possible speed provided for the *detection* and quieting such disorderly persons." And a few years later, a second inquest, "taking in consideration the great disorders and the turbulent behaviour of *many people* in this city, present the great necessity of a ducking-stool for *such people*, according to their deserts." [36]

There are many indictments for forestalling the markets and regrating, offences against public trade that excited in that day the popular attention now centered on rebates and trusts.

In 1731 an execution took place at New Castle which, it is to be hoped, was exceptional in the annals of the colonies. Catherine Bevan, together with a servant named Peter Murphy, were indicted, tried and found guilty of the murder of the woman's husband, Henry Bevan. The conviction would seem to have been obtained principally upon the confession of the servant. By the common law at that time the murder of a husband by his wife was petit treason, and the punishment was to be drawn and burned. Accordingly, on September 10, 1731, the man was hanged and the woman burnt pursuant to their sentence. A gruesome account of the affair appears in Franklin's "Pennsylvania Gazette" for September 23, 1731:

"She deny'd to the last that she acted any part in the murder and could scarce be brought to own that she was guilty of consenting. Neither of them said much at the place of execution. The man seemed penitent but the woman appear'd hardened. It was designed to strangle her dead before the fire could touch her; but its first breaking out was in a stream which pointed directly upon the rope that went round her neck, and burnt it off instantly so that she fell alive into the flames, and was seen to struggle."

To return to the courts. At a meeting of the council held on November 9, 1719, Governor Keith called attention to the repeal of the several acts relating to courts, and proposed that the board consider the best means of meeting the inconvenience caused thereby. The consensus of opinion was that the governor should issue special commissions authorizing the justices to hold court on the days when

[36] The Forum, vol. i, 231.

they should be held under the repealed laws. Similar action was taken in the following March in reference to the supreme court, and David Lloyd, who was now chief justice, prepared the forms of commission. In this way the courts were continued until at a meeting of the council, May 12, 1722, it was observed that the courts would be "more regularly and effectually established by ordinance, as they are done in some of our neighboring governments, than by any particular Commissions," and it was recommended that the matter be brought to the attention of the House of Representatives. A bill was promptly passed and messaged to the council, where it was referred to Richard Hill, Isaac Norris, James Logan and the attorney general, Andrew Hamilton, for amendment. The bill as amended was returned to the house, and on May 22, 1722, became a law.[15]

This act apparently was never considered by the crown, but, in some manner, was allowed to become a law by lapse of time, according to the charter. The reason for its escape lies probably in an oversight of the clerks of the council rather than in any intention on the part of the board to give it even a tacit approval. The act appears in a list, under consideration by the board of trade in 1739, which the lords commissioners could not find to have been ever approved.[16] Mr. Paris, the agent for the colony, after tedious searches, found some of these acts "laid up in a by corner of the Board of Trade and covered very thick with dust." In the list the act we are discussing is marked "supplied." As a matter of fact, three months before the time for its consideration had expired, the act had been supplied by the Act of August 27, 1727,[17] which was repealed by order in council September 21, 1731. In repealing the latter act, the point seems to have been overlooked that the Act of 1722 was revived by the repeal, and the question of the crown's power to pass upon it then was not raised.

Upon the repeal of the Act of 1727 a special session of

[15] III Stat. at Large, 298.
[16] III Stat. at Large, 488.
[17] IV Stat. at Large, 84.

the assembly was called, and an act passed formally reviving the Act of 1722 (Act of November 27, 1731, IV Stat. at Large, 229). This reviving act seems to have been allowed to become a law by lapse of time. Mr. Fane, the king's counsel, to whom it was referred by the lords commissioners, saw no objection to it. The Act of 1722, which in many of its provisions remained in force until after the revolution, provided for county courts of quarter sessions, composed of justices appointed by the governor, and for county courts of common pleas to be held four times a year by justices, also appointed by the governor, with authority to hold pleas of assizes, *scire facias*, replevins and all manner of actions, civil, personal, real and mixed, and to grant writs of partition and writs of view.

As to the supreme court, the act provided as follows:

"And be it further enacted by the authority aforesaid, That there shall be holden and kept at Philadelphia a court of record twice in every year: (That is to say) on the twenty-fourth day of September and the tenth day of April, if the same days, or either, do not happen to be the First day of the week, and in such case the said court shall be held on the next day following; which said court shall be called and styled the supreme court of Pennsylvania. And that there shall be three persons of known integrity and ability, commissionated by the governor, or his lieutenant for the time being, by several distinct patents or commissions, under the great seal of this province, to be judges of the said court, one of whom shall be distinguished in his commission by the name of chief-justice. And every of the said justices shall have full power and authority, by virtue of this act, when and as often as there may be occasion, to issue forth writs of habeas corpus, *certiorari* and writs of error, and all remedial and other writs and process, returnable to the said court, and grantable by the said judges by virtue of their office, in pursuance of the powers and authorities hereby given them.

Provided always, That upon (any) issue joined in the said supreme court, such issue shall be tried in the county from whence the cause was removed, before the judges aforesaid, or any two of them, who are hereby empowered and required, if occasion require, to go the circuit twice in every year, * * * * and to do generally all those things that shall be necessary for the trial of any issue, as fully as justices of *nisi prius* in England may or can do.

And that the said judges, or any two of them, shall have full power to hold the said court, and therein to hear and determine all causes, matters and things, cognizable in the said court, and also to hear and determine all and all manner of pleas, plaints and causes, which shall be removed or brought there from the respective (general) quarter-sessions of the peace and courts of common pleas, to be held for the respective counties of Philadelphia, Chester and Bucks, as also for the city of Philadelphia, or from any other court of this province, by virtue of any of the said writs. And to examine and correct all and

all manner of errors of the justices and magistrates of this province, in their judgments, process and proceedings in the said courts, as well as in all pleas of the Crown, as in all pleas real, personal and mixed; and thereupon to reverse or affirm the said judgments, as the law doth or shall direct. And also to examine, correct and punish the contempts, omissions and neglects, favors, corruptions and defaults, of all or any of the justices of the peace, sheriffs, coroners, clerks and other officers within the said respective counties. And also shall award process for levying, as well of such fines, forfeitures and amercements, as shall be estreated into the said supreme court, as of the fines, forfeitures and amercements, which shall be lost, taxed and set there, and not paid to the uses they are or shall be appropriated.

And generally shall minister justice to all persons, and exercise the jurisdictions and powers hereby granted concerning all and singular the premises according to law, as fully and amply, to all intents and purposes whatsoever, as the justices of the court of King's Bench, common pleas and exchequer at Westminster, or any of them, may or can do.

Saving to all and every person and persons, his, her or their heirs, executors and administrators, their right of appeal from the final sentence, judgment or decree of any court within this province, to His Majesty in council, or to such court or courts, judge or judges, as by our Sovereign Lord the King, his heirs or successors, shall be appointed in Britain, to receive, hear and judge of appeals from His Majesty's plantations.

Provided, The person appealing shall, upon entering his appeal in the court where the sentence, judgment or decree shall be given in this province, pay all costs before that time expended in the prosecution, or defending the said suit; and shall further enter into bond, with two good and sufficient securities in the sum of three hundred pounds, to the defendant in the appeal, conditioned to prosecute the said appeal with effect within the space of eighteen months after the entry of such appeal, and to satisfy the judgment of the court from which he appeals; and further, to pay all such costs and damages as shall be adjudged to him to pay, in case a sentence, judgment or decree, pass against the said appellant, or in case he, she or they fail to prosecute their appeal with effect."

"And be it further enacted by the authority aforesaid, That the said judges of the supreme court shall have power and are hereby authorized and empowered, from time to time, to deliver the gaols of all persons which now are or hereafter shall be committed for treasons, murders, and such other crimes as (by the laws of this province) now are or hereafter shall be made capital or felonies of death as aforesaid. And for that end from time to time to issue forth such necessary precepts and process, and force obedience thereto, as justices of assize, justices of oyer and terminer, and of gaol delivery, may or can do in the realm of Great Britain."

We have referred to the short-lived Act of August 27, 1727. This act was almost a counterpart of the Act of 1722, but was designed to deprive the supreme court of the power to institute original process. Its repeal was accomplished by John Moore, the king's collector of customs at Philadel-

phia, who strongly objected to it on the ground that actions involving the revenue would thenceforth have to be tried in the county courts, the judges of which were "all merchants." This insinuation against the impartiality of the lower courts was resented by the proprietors and the governor. Nevertheless the act was repealed. Whatever may have been the intention of the Act of 1722, it would seem that the supreme court was chary of assuming original jurisdiction. Chief Justice Tilghman in *Comm.* v. *Smith*, 4 Binn. 117 (1811), informs us that prior to 1786 the court had, certainly for a long time, exercised no original jurisdiction except in cases of fines and common recoveries, which, though actions in form, were in substance no more than mere conveyances of record.

Two acts amending the Act of 1722 were passed prior to the revolution. By the first of these, the Act of September 29, 1759, the judges of the court of common pleas were appointed to hold the orphans' court, a duty which had for some time previously been assigned to the quarter sessions, and the judges of the latter court were not to sit in the common pleas, which was to consist of five persons. No exception was taken to these provisions, which were approved, but the proprietors strongly objected to another clause in the act which provided that the judges of the common pleas, as well as the justices of the supreme court, should hold their commissions "quam diu se bene gesserint" and be removable only on the address of the assembly. The committee of the council were strongly against this provision, not only as limiting the charter rights of the proprietors, who were therein permitted to nominate judges without limitation, but as perpetuating in the seat of justice men of secondary capacity, except the chief justice. It was further stated that in the other colonies the judges held "durante bene placita," and it was not expedient to make a change in Pennsylvania which would confer no real benefit upon the inhabitants and "excite a just jealousy in the other colonies by seeming to extend advantages to this proprietary government, which have been denied to those under his

majesty's immediate care."[18] The act was accordingly disapproved September 2, 1760.

Another amendment to the Act of 1722 was adopted, by which the number of supreme judges was increased to four, and the removal of cases into the supreme court in suits involving less than fifty pounds, except in cases involving title to land, was prohibited under penalty, in the case of the plaintiff, of loss of costs and of the defendant of double costs. It was also provided that appeals to England should be taken only on demurrer to evidence, bill of exceptions or writ of error. This act was allowed to become a law.[19]

An examination of the provincial commissions in the archives will show that the practice prior to the revolution was to issue to the justices of each county, the number being indefinite, a joint commission authorizing three or more of them to hold the quarter sessions, and likewise assigning any three or more of them to hold the court of common pleas.[20]

Separate commissions were issued to the chief justice and justices of the supreme court, and a joint commission of oyer and terminer. In these commissions the time is not stated for which they are to run. The commission of the peace seems to have been filled up and renewed at first yearly, but later at longer intervals of irregular length, and it was the custom for governors to renew the commissions at, or soon after, their accession to the government. At these various renewals it may be presumed that undesirable members were dropped out. The justices of the supreme court also were recommissioned from time to time, but would seem to have held their offices until death or resignation. The real trouble seems to have been to persuade men of ability to fill the thankless positions. The assembly neglected the matter of compensation, and on Penn's second visit he seems to have himself promised the chief justice one hundred pounds a year. In 1706 the chief justice made a complaint in the council that this promise was not being

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[18] V Stat. at Large, 462.

[19] VII Stat. at Large, 107.

[20] See examples in vol. viii and ix, Pa. Arch. (2d series).

kept, and it was proposed that the assembly should be asked to make some provision for the judges, as it was unfair to throw this expense on the proprietor. Judge Mompesson, who succeeded to the office soon afterwards, accepted, "though the present encouragement be but very slender and no way inviting."[21] The perquisites of the court were the fees allowed by the fee bill. Those established by the Act of 1723[22] were four shillings for every allocatur signed, six shillings for every case brought into court by *certiorari*, taking bail two shillings, every judgment six shillings, every rule two shillings. As late as 1772 the salary of the chief justice of the supreme court was 200 pounds, and of the associate justices 150 pounds.[23]

In the county courts the justices received trifling fees for various services, and the expenses of the sitting of the court were paid by the county.

The Act of January 28, 1777 (IX Statutes at Large, 29), provided that one justice should be appointed to preside in the respective courts of common pleas, quarter sessions and orphans' court, but the honorary office of president of the court had existed from the earliest times and was applied to the first in the commission, or senior justice, the same person being, in many cases, for a long series of years first in the commission. The city of Philadelphia, under its charter, had a criminal court of its own presided over by the city recorder, usually a lawyer of distinction, assisted by the aldermen. Those of the aldermen who were in the commission of the peace also sat in the county courts.

By an Act of January 12, 1705,[24] a special court was established for the trial of negroes, consisting of two judges, specially commissioned by the governor, in the respective counties, assisted by six freemen of the county; the purpose being to obtain speedy trials and summary punishment for

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[21] II Col. Rec., 247, April 17, 1706.

[22] III Stat. at Large, 369; same in Act of Aug. 22, 1752; V Stat. at Large, 161.

[23] X Col. Rec., 53, Sept. 19, 1772.

[24] II Stat. at Large, 233.

negro offenders, whose crimes excited some alarm in the province. This act was repealed in 1780.

By an Act of May 28, 1715,[25] the justices of the peace were given jurisdiction to try, and finally determine all suits for debts and demands under forty shillings, and issue executions on these judgments, through the constable, by levy on the goods or attachment of the body of the defendant. The court of the city of Philadelphia for the collection of small debts was abolished, and it was further enacted that no court of the province should have jurisdiction of debts under said amount, but that the act should be the exclusive remedy. Debts for rents or contracts relating to real estate were excluded from this jurisdiction. The act was allowed to become a law, and is the foundation of the present civil jurisdiction of the justices of the peace as amplified by the Act of March 20, 1810 (P. L. 208) and subsequent acts.

As for the judges of the respective courts, to mention them all would be to give a biographical history of the province. Nearly every man of distinction at that day filled at some time a place on the bench. It was, in the lower magistracy, the stepping stone to higher office, and, with the higher officials, part of the burden and duty of government. It is interesting to note that Benjamin Franklin sat for a time in the common pleas, but was wise enough to see that the position required a special knowledge that he did not possess, and was not sufficiently interested to acquire. Except the recorders of Philadelphia, few, if any, of the judges of the lower courts had any legal training, beyond such as they acquired in the exercise of their office. In the supreme court, David Lloyd, chief justice from 1717 to 1731, had a reputation in his day as an able lawyer, but in history he is chiefly conspicuous as the spokesman of the anti-proprietary party in the assembly. James Logan, his one-time enemy, who succeeded him in the office, was the most conspicuous figure in the province in his time, excepting only Penn himself. He was not a lawyer, but was

[25] III Stat. at Large, 63.

talented and well educated, and had sat in the quarter sessions and common pleas of Philadelphia for years. John Kinsey, who became chief justice in 1743, was a lawyer in extensive practice, and the governor considered it a matter of congratulation that one of the legal profession had consented to take the position. At the time when Dallas' Reports begin, William Allen presided. He was the richest citizen in the province and a son-in-law of the distinguished lawyer Hamilton. Educated in London, he had filled various offices, including those of mayor, recorder of Philadelphia and judge of the common pleas, and was also one of the original trustees of the College of Philadelphia. At the revolution, Benjamin Chew, the chief justice, was displaced, but after spending fourteen years in retirement was made president of the high court of errors and appeals in 1791.

In 1698 a volume was printed in London, entitled, "A historical and geographical account of the province of Pennsylvania and of the West New Jersey in America, etc. by Gabriel Thomas who resided there about fifteen years." Regarding two of the learned professions he writes: "Of lawyers and physicians I shall say nothing, because the country is very peaceable and healthy; long may it continue so and never have occasion for the tongue of one and the pen of the other, both equally destructive to men's estates and lives; besides, forsooth, they hangman-like, have a license to murder and make mischief." Such views so far, at least, as our profession is concerned, were not uncommon among the early colonists. Many of them belonged to persecuted religious sects whose experiences with the law in their former homes were not such as to inspire pleasant sentiments towards the courts or their officers. Few were drawn from that class of society which, through birth or education, could be expected to feel or display any interest in professional learning, while those few who might have done so, were enthusiasts filled with utopian theories of government or utilitarians who regarded the lawyer as an "unproductive consumer." Nor was there anything to tempt an ambitious barrister to desert Westminster Hall for a hut

in the wilderness. The colonists were usually poor, their possession half-cleared farms, commerce was controlled by the mother country, fees were necessarily small, and the only road to professional distinction and wealth was through crown offices or successful land speculation. As, however, courts without counsel are like Hamlet without Hamlet, there are evidences that even in the earliest days there were men willing to undertake the conduct of cases.

The early records of the court of assizes of New York show unmistakably the activity of certain men who appear in so many cases that they must have been regarded as regular practitioners. In the records of the court of New Castle the following minute appears under date of November 7, 1676:[26] "Upon petition of Thomas Spry desiering that he might be admitted to plead some peoples cases in court etc. the worpp court have granted him a license so long as the petitioner behaves himself well and carries himself answerable thereto." Evidently something must have happened in 1677 to disgust the governor with the ways of the law, for on May 29th of that year the governor and council "resolved and declared that pleading attorneys be no longer allowed to practice in the government but for the depending cases," which order was read in open court at Upland and New Castle.[27] The order, however, was soon relaxed, for, on June 16th following, John Matthews was admitted to practice as an attorney at New Castle, upon taking an oath "not to exact unallowed fees, nor to take fees from both plaintiff and defendant and that he will not take any apparent unjust case in hand, but behave as all attorneys ought to do."[28] Subsequently it was ordered that the crier of the court "receive for every attorney admitted and sworn in court, 12 guilders or have a beaver." The crier no longer gets a beaver, but there is still a fee to be paid on admission by those prisoners of hope who have satisfied the examiners.

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[26] New Castle Records, p. 9.
[27] Hazard's Annals, 438.
[28] New Castle Records, p. 83.

It was the dream of Penn that in his colony the laws should be so plain and the pleadings so simple that every person could plead his own cause, and it was so provided in his laws agreed upon in England and embodied in the Act of March 10, 1683. His paternalism, and the peace-loving tendencies of his more sincere followers, tended to discourage skilled advocacy. In 1685 and again in 1686 the council promulgated laws against lawyers' fees. That of 1686 is as follows:

"For the Voyding of to frequent Clamors and manifest Inconveniences weh usually attend mercenary pleadings in Civill Causes, It is Enacted by ye authority aforesaid, that noe persons shall plead in any Civill Causes of another, in any Court whatsoever within this Province and Territories, before he be Solemnly attested in open Court, that he neither directly nor Indirectly hath in any wise taken or received, or will take or receive to his use or benefit, any reward whatsoever for his soe pleading, under ye penalty of 5 lb. if the Contrary be made appear."[19]

Neither of these acts, however, passed the assembly.

It soon became evident that lawyers could not, or would not, be dispensed with, and in 1686 David Lloyd was dispatched by the proprietor to Pennsylvania with a commission to act as attorney general of the province. The Acts of 1710 and 1715 for establishing the courts had provisions for the admission of attorneys, as also the Act of May 22, 1722, which finally became a law, and which provided "that there may be a competent number of persons of an honest disposition and learned in the law, admitted by the justices of the said respective courts, to practice as attorneys there." In the Act of March 30, 1722-23,[20] for regulating official fees, the attorneys' oath is prescribed in a form very similar to that used at the present day. "Thou shalt behave thyself in the office of attorney, within the court to the best of thy learning and ability, and with all good fidelity, as well to the court as to the client. Thou shalt use no falsehood, nor delay any person's cause for lucre or malice."

Even before this a miniature bar had sprung up among

[19] Charter and Laws, 507.

[20] III Stat. at Large, 379.

those active in public affairs, among whom were Abraham Mann and John White, members of the assembly, and Patrick Robinson, clerk of the court, and afterwards a member of the provincial council. In 1683 John White was appointed attorney general to try a case against counterfeiters, and in 1685 Samuel Hersnet was appointed to the office. The two men, however, that stand out most prominently at this first period were David Lloyd and John Moore. The latter, who belonged to a prominent family and had emigrated to Pennsylvania from South Carolina prior to 1696, was appointed advocate of the court of admiralty by Colonel Quarry, and was afterwards attorney general. As the province grew with great rapidity others came in, and in the early part of the eighteenth century there was a considerable influx of educated lawyers. The natural result was greater precision in the pleadings and closer adherence to English forms and practice. Robert Assheton, who filled the office of prothonotary from 1701 to 1727, was a trained lawyer and an associate justice of the supreme court. From his time the indictments were scientifically prepared, and in fact all the clerical work of the court offices improved.

Nevertheless the bar must have been a small and select body, since there are recorded more than one accusation of attempts to "corner" it. In 1708[81] a petition was read in the council from one Joseph Heaton:

"representing that he had been sued in an Action of Trover and Conversion, in the County of Bucks, by J. Growdon, yt he had procured a writt of Error, by which the cause is to be brought before the Provincial Judges, in the said County, the 14th of this Instant; that in the meantime the said Jos. Growdon arrested him in Philadia. on the same account in an Action to which he must answer at the County Court in Philidia., on the 15th Instant, wch. two several Courts coming so near together layes the Petitr. under great hardships; he also represents that his antagonist himself is Judge of the Provincial Court, and further that he has retained all the Lawyers in the County (that have leave to plead,) against him; Whereupon he prays that the Govr. would be pleased to appoint an Impartial Judge to hear his cause, and would either assign him Counsel, or so ascertain the Provincial Court, that if he be at the Charge of procuring some from New York, he may not be disappointed.

Upon wch. Jos. Growdon himself being present, answer'd that his

[81] II Col. Rec., 406, 2/4/1708.

action in Bucks, and that in this County, are different; that he never retained more than one Counsell, viz: John Moore, in this cause, but that he not being able to attend, procured another to act for him; by which means without any design of his, two became Concerned in it, that it being impracticable that a man should Judge in his own cause: that part of the Petition was altogether needless."

It was resolved that the petitioner be left to find his own counsel, and Yeates, the second judge, was assigned to hear the case.

In the following year Francis Daniel Pastorius and Johannes Jawert petitioned the council against proceedings in ejectment brought by one Sprogel to recover the estates of the Frankfort Company, an association of German purchasers of land, averring that Sprogel as part of his "abominable plot did fee all the known attorneys or lawyers of this province either to speak for him or to be silent in court, in order to deprive the petitioners of all advice in law." [22] Upon examining the petitioners in the council David Lloyd was declared "the principal agent and contriver of the whole," and steps were taken to protect the purchasers. The case is reported in Pennypacker's Colonial Cases [23] with an account by Pastorius of the whole nefarious transaction.

In *Lyle* v. *Richards*, 9 S. & R. 322, Chief Justice Tilghman remarks that there were few lawyers of eminence in the province prior to Tench Francis, although there were never wanting strong minds well able to conduct the business of the courts, and the fact that the leading lawyers of the following generation received their training in the Inns of Court led them perhaps to look down on their predecessors, some of whom were in extensive practice that included the neighboring colonies. One name, however, stands at the head of the early bar, that of the brilliant Andrew Hamil-

[22] II Col. Rec., 420, Mar. 1/1708-9.

[23] *Heather* v. *Frankfort Co.*, Penny. Col. Cas., p. 142. That the "cornering" of the bar was not a new experiment would appear from an incident mentioned by Barrington in his "Observations on the Statutes," p. 294n. "There is also * * * a petition of Robert Pickerell, exhibited to the king in parliament the second year of Richard the Second; by which he complains that Alice Perrers had retained all the advocates in Westminster Hall, so that he could have no advice; 'si il ne donneroit si grande summe d'or, quil ne poit attainder'."

ton. The history of Hamilton is worth studying, as he is the only American lawyer of his generation that enjoyed an international reputation. The most interesting personal episode in his career was the part he took in the erection of Independence Hall, which was built from plans prepared by him and under his personal supervision. To the legal profession he is best known for his brilliant and successful defence of the printer, Peter Zenger, tried for seditious libel, a case of real historical importance as well as contemporary interest. In this case, tried in the supreme court of New York in 1735, Hamilton carried the jury against the instructions of the court and obtained the defendant's acquittal by a bold address in which the liberty of the press was asserted with unprecedented vigor. The doctrines which he advanced, regarded as unsound at the time, have since become indelibly impressed upon English and American law, and the trial deserves careful reading on account of the light that it throws on contemporary political conditions and the effect that it produced on the law of libel.[84]

As the century advanced it became the general custom, for those who could afford it, to send their sons to be educated in the law at the Inns of Court. This was more prevalent in the Southern and Middle, than in the New England, colonies. From 1760 to the end of the revolution there were more than one hundred American students of law in London, of whom forty-seven were from South Carolina, twenty-one from Virginia, sixteen from Maryland, eleven from Pennsylvania, five from New York and the rest from the other colonies, no other colony than those named having more than two students.[85] Many of these men attained great distinction in professional and public life. Among those from Pennsylvania were Chief Justices Benjamin Chew, Thomas McKean, Edward Shippen and William Tilghman; Justice Jasper Yeates; Presidents of the Supreme Executive Council Joseph Reed and John Dickinson, as well as such distinguished lawyers and citizens as Nicholas Waln,

[84] Howell's State Trials, vol. 17, p. 675.

[85] Life and Times of John Dickinson, p. 28.

Edward and Richard Tilghman, William Rawle, Jared Ingersoll and Peter Markoe. It is not to be supposed that the education afforded by the Inns of Court corresponded to that given in a modern law school. Everything depended on the diligence of the student himself, and admission as a barrister came in due course after eating the required number of dinners regularly during the appointed terms. But the atmosphere and associations were conducive to study, while inspiration was to be drawn from the courts at Westminster, where the student attended and took notes of the arguments and decisions. Such note books were, in those days of scanty reporting, the treasured possessions of lawyer and judge and carefully consulted in the preparation of important arguments and decisions. In *Clayton* v. *Clayton*, 3 Binney, 476 (1811), the manuscript notes of one of these students was cited in the supreme court. The case was one involving the question as to whether certain devisees under a will took an estate in fee or for life, there being no words of inheritance, but a direction to divide. Mansfield's decision in *Wigfall* v. *Brydon*, 3 Burr., 1895, was cited in favor of a fee. It being difficult to reconcile this decision with other authorities, the case was explained as turning on a direction to sell and divide, which appeared from the manuscript notes of the case of *Goodright* v. *Patch*, decided in the King's Bench, June 20, 1773, taken by Edward Tilghman while a student at law. So, too, in the political capital of the kingdom, the student studied the conflicting doctrines of the Tory and the Whig and prepared his mind for the momentous changes about to occur in his home across the sea.

As the revolution approaches we find an able group leading the bar, Moland, Chew, Ross, Waln, Tilghman, Galloway and Dickinson. Time was no object to the courts in those peaceful and slumberous days. In a manuscript book of reports giving some cases of that time [86] the reporter says, in noting *Haldane* v. *Duffield*, April Term, 1768, "the remainder of Mr. Chew's argument I did not hear nor did

[86] Keith's Provincial Councillors, 328.

I wait Mr. Dickinson's and Mr. Tilghman's conclusion, this case having continued twelve hours." In 1774 Chew succeeded Allen as chief justice, and in September of that year hospitably entertained the members of the continental congress then assembled in Philadelphia. Washington and John Adams both mention dining with him on the twenty-second of that month.[37] Adams writes in his diary:

"Dined with Mr. Chew Chief Justice of the Province with all the gentlemen from Virginia, Dr. Shippen, Mr. Tilghman and many others. We were shown into a grand entry and staircase and into an elegant and magnificent chamber until dinner. About 4 o'clock we were called down to dinner. The furniture was all rich. Turtle and every other thing, flummery, jellies, sweetmeats, of 20 sorts, trifles, whipped sillabus, floating islands, fools, &ct., and then a dessert of fruits, raisins, almonds, pears, peaches. Wines most excellent and admirable. I drank Madeira at a great rate, & found no inconvenience in it."

The stately mansion of the chief justice yet stands, the fine old colonial hospitality a treasured memory. The smoke and dust of fratricidal war darkened it, its walls were battered with shot and its floor stained with blood; bench and bar were scattered, some to attain distinction in the camps and councils of the new nation, others to live obscurely through weary years of suspicion or to fly from the country of their birth as attainted traitors, their lands forfeited and their names soon forgotten.

William H. Loyd, Jr.

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[37] Keith's Provincial Councillors, 329.

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The Faculty of the Law Department and the Board of Editors of the American Law Register have determined to discontinue the department heretofore known as the "Progress of the Law" and to publish in its stead a series of Notes and short Comments on the most important recent cases. Although fewer cases will thus be treated, yet inasmuch as there will be fuller discussions of those noted and more frequent references to similar cases, it is hoped that the change will be a benefit to and will be approved by our readers. The change takes place in this issue.

NOTES.

WHEN A STATE IS A PARTY WITHIN THE ELEVENTH AMENDMENT.

On the twenty-second of June, last, the Circuit Court of the United States for the District of Arkansas, decided the case of *Western Union Telegraph Company* v. *Andrews*.[1] The decision raises again the much-mooted question of the circumstances under which a State is a party to a suit against its offi-

[1] 154 Fed. 95.

cials in the performance of their duty as State officers within the prohibition of the Eleventh Amendment. The case under consideration was as follows: A statute of the State of Arkansas provided that if any foreign corporation doing business in Arkansas removed any suit from the State to the Federal Courts they should forfeit their right to do business within the State. A penalty of $1000 was provided for every day such company continued to do business. The second section of the statute made it the duty of the prosecuting attorneys in the various counties to sue for these penalties in the name of the State, for the benefit and use of the county in which the suit was brought. The suit in the Circuit Court was brought by the complainant to enjoin the prosecuting attorneys of the several judicial districts of Arkansas from instituting against it any proceedings for penalties forfeited under the above statute. The injunction was refused on the ground that the suit was within the prohibition of the Eleventh Amendment.

The Eleventh Amendment, passed to stay the wave of indignation which spread through the country as a result of the decision of *Chisholm* v. *Georgia*,[2] has become since the Civil War a serious bone of contention in the Federal Courts as a result of two lines of cases: (1) the attempts of the various Southern States to resuscitate their finances by means of the creation of certain bond-issues which were subsequently repudiated, and (2) the various statutes passed by the States throughout the last twenty-five years to regulate the rates charged by public service corporations. The earliest test as to when a State was a party was that laid down by Chief Justice MARSHALL in *Osborn* v. *Bank*:[3] that the appearance or absence of the State as a party defendant on the record was a criterion that would determine whether or not the suit was against the State.[4] The test was later repudiated, the courts declaring they would look beyond the record to see if the State was the real party in interest, and a new test was evolved:—whether or not the complainants asked for specific performance against the State. If they did, the Court said there could be no relief; the suit was against the State.[5] If they did not the Court would take jurisdiction.[6]

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[2] 2 Dallas, 419 (1793).

[3] 7 Wheaton, 738 (1824).

[4] *Davis* v. *Grey*, 16 Wall. 203 (1872).

[5] *Louisiana* v. *Jumel*, 107 U. S. 711 (1882); *Hagood* v. *Southern*, 117 U. S. 52 (1885).

[6] *Board of Liquidation* v. *McComb*, 92 U. S. 531 (1875); *Virginia Coupon Cases*, 114 U. S. 270 (1884); *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Scott* v. *Donald*, 165 U. S. 58.

The test was not always applied with substantial accuracy[7] and seems to have been abandoned, since the later cases say almost nothing about it. Then came the famous decisions of *Reagan* v. *Farmers' Loan and Trust Co.*,[8] and *Smyth* v. *Ames*,[9] which have been affirmed in a number of cases.[10] All these were suits to enjoin State officials from prosecuting indictments or suits for penalties against the defendants for charging rates in excess of those declared reasonable by a rate-fixing commission created by State statute—the complaint being that the rates fixed were so low as to be a deprivation of property without due process of law and hence a violation of the Fourteenth Amendment. In each of these cases the injunction was granted, the Court basing its decision on the proposition that as the State had no pecuniary or proprietary interest in the suit, but merely a governmental one, the suit could not be against the State.[11] In the case of *Fitts* v. *McGhee*[12] the injunction was refused upon similar facts on the ground that in the latter case the defendants who were not mentioned by name in the statute were not "specifically charged" with the duty of carrying out the law in question, as they had been in *Reagan* v. *Co.*[8] and *Smyth* v. *Ames*.[9] The distinction of the Court seems questionable in theory, but has never been overruled.[13]

As in the present case the defendants were specifically charged with the duty of carrying out the statute, the decision seems erroneous whether considered in the light of the specific performance test, that of *Reagan* v. *Co.*, or that of *Fitts* v. *McGhee*. The Court, however, bases its decision on *Fitts* v. *McGhee*, bringing the case within the rule of that decision by saying that the statute in question putting the duty of prosecuting

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[7] *In re Ayers*, 123 U. S. 443 (1887); *Hagood* v. *Southern*, 117 U. S. 52 (where of plaintiff's three prayers it would seem that only two amount to specific performance and yet the bill was dismissed).

[8] 154 U. S. 362 (1894).

[9] 169 U. S. 466 (1898).

[10] *Chicago, M. & St. P. R. R.* v. *Tompkins*, 176 U. S. 167 (1900); *Prout* v. *Starr*, 188 U. S. 544 (1902); *Mississippi R. R. Commission* v. *Illinois Central R. R.*, 203 U. S. 235 (1906); *Central Consolidated Gas Co.* v. *Mayer*, 146 Fed. 150 (1906).

[11] *Reagan* v. *Farmers' Loan & Trust Co.* at p. 390.

[12] 172 U. S. 516 (1899). It is interesting to note that this decision was pronounced only a year later than *Smyth* v. *Ames* by the same court which pronounced the latter decision—the opinion in both cases being by Justice Harlan.

[13] As a matter of fact, the statute in *Smyth* v. *Ames* nowhere seems to charge the Attorney-General or the board with the special duty of bringing suits for penalties or instituting criminal prosecution. (House Roll No. 33, Nebraska Statutes for 1893.)

the suits for penalties upon the prosecuting attorneys of the various counties was merely declarative of their duty under the general laws of the State, and interpret the "special charging" of *Fitts* v. *McGhee* to mean "an administrative duty such as is exercised by boards or ministerial officers, but not attorneys." The Federal Courts have, however, frequently enjoined attorneys-general from bringing suit.[14] It is also true of all these cases that the duties laid upon the attorney-general by the statutes in question were merely declaratory of his duty to prosecute all suits for penalties incurred under State statutes and hence this distinction of the Court, too, seems to fall. The Court considered the penalties collectible for the benefit of the counties sufficient to give the State a pecuniary interest in the result. In a long line of decisions, however, the collection of penalties forfeited to the State have been enjoined.[15] In both these respects the case seems to carry the principle of the Eleventh Amendment beyond any of its immediate predecessors, and the result of an appeal to the Supreme Court, if taken, should be awaited with interest. The question is one of ever-increasing importance, and appeals from the Circuit Courts of North Carolina and Minnesota[16] involving similar questions under the Eleventh Amendment are now pending before the Supreme Court.

Liability of Wholesale Manufacturer to Consumer.

The numerical weight of American authorities supports the doctrine that there is generally no liability of a manufacturer for injury to one purchasing from a dealer caused by defects due to negligence in the manufacture of those articles.[1] Three reasons are stated for this rule: First, that injury is not probable; second, that the agency of the dealer is an intervening, independent cause, and third, that public policy requires such a limit of liability of the manufacturer. It is submitted that in the case of latent defects, the first two reasons are unsound as being inconsistent with the law of negligence; for as to the first, there is an evident probability of danger—and as to the

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[14] *Reagan* v. *Farmers' Loan and Trust Co.*, 154 U. S. 362; *Smyth* v. *Ames*, 169 U. S. 466; *Chicago, M. & St. P. R. R.* v. *Tompkins*, 176 U. S. 167; *Prout* v. *Starr*, 188 U. S. 544; *Haverhill Gas Co.* v. *Barker*, 109 Fed. 694 (1901); *Consolidated Gas Co.* v. *Mayer*, 146 Fed. 150 (1906).

[15] *Smyth* v. *Ames*, 169 U. S. 466; *Missouri, K. & T. R. R. Co.* v. *Missouri Railroad Commissioners*, 183 U. S. 53 (1901); *Chicago, St. P. & M. R. R.* v. *Tompkins*, 176 U. S. 167; *Prout* v. *Starr*, 188 U. S. 544; *Consolidated Gas Co.* v. *Mayer*, 146 Fed. 150 (1906).

[16] *Ex parte Long.*

[1] *Huset* v. *J. I. Case Machine Co.*, 120 Fed. 865.

second, the mere passage of the article through the hands of an intermediate person who could not discover the defect does not constitute an intervening independent cause. If public policy is to decide the question, it should be noted further that the rule is in conflict with the common law principle which requires that a man should exercise care in the conduct of his business,[2] this duty being imposed because of the remunerative character of his employment, although the consideration need not necessarily move from the plaintiff. Thus, a physician has been held liable for negligence in treating plaintiff's wound, although he was hired by a third person.[3] The rule of exemption from liability does not, despite *dicta* to the contrary, seem to be supported by the English[4] cases, nor by those of New York[5] or Minnesota.[6]

Moreover, there are admitted exceptions, and these exceptions "are as well defined and settled as the rule itself."[7] One of these exceptions exists in the case of negligence in the manufacture of articles which are "intended to preserve, destroy or affect human life."[7] Parenthetically,—it would seem that these "exceptions" are merely the most obvious instances of the application of the common law principle above referred to, but as the principle has been submerged these instances are left isolated. Within the scope of this exception, are explosives,[8] drugs[9] and foods.[9]

The recent case of *Tomlinson* v. *Armour & Co.*, 65 Atl. Rep. 883 (N. J.), held that a declaration was demurrable which alleged that the plaintiff had been made sick by eating diseased ham bought from a retailer, but negligently packed by the defendant wholesaler. The Court rested its decision upon a principle of contract law; *i. e.*, that there is no implied warranty of wholesomeness by a manufacturer in the sale of food to a retail dealer, a conclusion that seems supported by the weight of authority.[10]

It would seem, however, that the denial of the existence of such a warranty should not bar the plaintiff's claim, which was framed *in tort*. In fact, even if such a warranty had existed it

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[2] See Mr. Bohlen's essay on "The Basis of Affirmative Obligations in the Law of Torts," pp. 6, 10, 51-101.

[3] *Pippin* v. *Shepard*, 11 Price, 411.

[4] *George* v. *Skivington*, L. R. 5 Ex. 1; *Dalyrell* v. *Tyson*, 96 E. C. L. R.; *cf. Winterbottom* v. *Wright*, 10 M. & W. 109 (*dicta*).

[5] *Devlin* v. *Smith*, 89 N. Y. 470; *cf. Fox* v. *Buffalo Co.*, 21 App. Div. N. Y. 321.

[6] *Shubert* v. *Clark Co.*, 49 Minn. 331.

[7] *Peters* v. *Johnson*, 41 S. E. 190 (W. Va.).

[8] *Thomas* v. *Winchester*, 6 N. Y. 497.

[9] *Bishop* v. *Weber*, 139 Mass. 411.

[10] Benjamin on Sales, Sec. 671.

could not have bound the defendant to whom the plaintiff was a stranger. The Court ignored the real ground upon which the plaintiff's claim rested; *i. e.*, the breach of a duty imposed by law. It is submitted that the case falls within the exception to the general rule as to liability of manufacturers, which exists in the case of an article "intended to preserve, destroy or affect human life." In the case cited above,[9] which so held, it is said: "The furnishing of provisions which endanger human life or health stands clearly upon the same ground as the administering of improper medicines, from which a liability springs, irrespective of any question of privity between the parties."

Liability of Stockholders upon Unpaid Stock Subscription.

The liability of a stockholder upon his unpaid stock subscription to the corporate creditor, has always been worked out through the fictional person of the corporate entity, on the ground that the entity is the debtor of the corporate creditor. The problem has always been to devise some theory by which to prevent the stockholder from asserting rights, which are perfectly valid against the entity, in order to give the corporate creditor a greater right against the stockholder than that possessed by the entity itself. Two theories have been advanced. The "trust fund" doctrine regards the capital stock as a trust fund for the benefit of the creditors. When the stockholder attempts to escape liability, by settling up claims which are good as against the entity, as for example, a set-off or a release, but which would prevent any remedy to the creditor, he finds that the claims are no longer mutual, and cannot be set up against each other. This theory has been severely criticised. It is admitted that in the strict sense of the word there is no trust; that it is a misnomer; and that what is meant, is merely admisistration of assets in equity.[1] If that is so, the "trust fund" theory does not explain why the creditor should be given a greater right against the stockholder than that possessed by the entity. The other theory gives relief on the ground of fraud, in an action of deceit. It is said that the creditor is presumed to rely upon the stated capital of the entity, as security, and that when stock is issued, purporting to be fully paid up, when, in fact, it is not, he is deceived. The stockholder who accepts such stock is guilty of a misrepresentation, because he holds out the entity as possessing its capital stock fully paid up,

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[1] *Hollins* v. *Brierfield Coal and Iron Co.*, 150 U. S. 371 (1893); *McDonald* v. *Williams*, 174 U. S. 397 (1899); *O'Brear Jewelry Co.* v. *Volfer & Co.*, 106 Ala. 205 (1894); Cook on Corporations (5th Ed.).

when it is not, and is compelled to make good his representation,[2] when any person advances credit to the entity in reliance thereon. But if credit is advanced prior to the issue of the stock, or with notice that it was not in fact paid up, there could be no reliance,[2] and, therefore, no recovery on the ground of fraud. The entity cannot recover, because of the release. But this theory does not explain why a stockholder is not allowed a set-off of a valid claim against the entity, when the stock is not issued as fully paid up with a release from further payment. Because a creditor has notice that a balance of the stock subscription is still unpaid, subject to call, he is not prevented from compelling the stockholder to pay it, and the authorities agree that no set-off is allowed.[3] Therefore, the fraud theory is also unsatisfactory, and we have no theory which does account for the liability of the stockholder upon his unpaid stock subscription, when we regard the entity as the debtor of the corporate creditor. Justice to the creditor demands the enforcement of this liability. There is a consistent solution for it.

To-day, when a certain solution of a corporate problem is demanded by justice, and it cannot be reached by working out the problem through the fictional entity, some courts absolutely disregard[4] the entity; and instead, consider the stockholders as a group of associates with joint assets and liabilities.[4] Such decisions are notices to the entity to quit. The solution that has been reached in the problem before us, demands that the entity be disregarded. It is a fiction, and as such implies that the truth is otherwise. It is merely a substitute for a real explanation, and can have no permanent place in a sound legal system.[5] The stockholders, not the entity, owe the creditor.[6] At common law they were liable to him without limit.[7] The limitation[8] is a modern doctrine.[9] If we regard the entity as the

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[2] *Hospes* v. *Northwestern Mfg. Co.*, 48 Minn. 174 (1892).

[2] *Bickley* v. *Schlag*, 46 N. J. Eq. 533 (1890).

[3] *United States* v. *Milwaukee Refrig. Transit Co.*, 142 Fed. 247 (1905); *Att'y. Gen.* v. *Standard Oil Co.*, 49 Ohio St. 137 (1892); *Northern Securities Co.* v. *U. S.*, 193 U. S. 199 (1903); *Mobile* v. *Watson*, 116 U. S. 289 (1886).

[4] See article by Mr. George Wharton Pepper entitled, "A Brief Introduction to the Study of the Law of Associations," 49 Am. Law Reg. (N. S.) 255, pp. 258-259.

[5] See same article, pp. 266-267.

[6] See article by Mr. Samuel Williston entitled, "History of the Law of Business Corporations before 1800," 2 Har. Law Rev. 105, 148, pp. 160-162. Also *Dr. Salmon* v. *The Hansborough Company*, Ch. Cas. 294; 6 Vin. Abr. 310 (1641); *Hume* v. *Windyard and Wando Canal Co.*, 1 Car. L. J. 217 (1826).

[7] *Carr* v. *Inglebart*, 3 Ohio St. 457 (1854).

[8] See article by Mr. George Wharton Pepper entitled, "Irregular Associations," 52 Am. Law Reg. (N. S.) 409, 504, 576, pp. 432-435.

debtor, it is correct conclusion. A creditor can only look to the assets of his debtor for payment.[10] But this limitation of the liability has not changed its nature. It is that of co-debtor, and until the limit is reached the problem is the same as though no limit were imposed.[9] No one would contend that co-debtors could defeat the claims of their common creditor by an agreement *inter se*, releasing each other from liability, nor would it be possible to conceive of co-debtors setting off claims, which they had against each other, when sued by the common creditor. Such claims can only be asserted when the rights *inter se* are determined, and can have nothing to do with the right of the common creditor against the individual associate. The interposition of the entity as debtor, has merely served to confuse these two distinct sets of rights. This view readily explains why a stockholder upon a subsequent issue of stock, is not liable to a prior creditor, because in no sense of the word did he contract the debt. But notice on the part of the creditor, that stock was not, in fact, paid up, though issued as such, should not necessarily bar him, if we regard the associates as co-debtors, and it would not be necessary to pass a statute to accomplish such a desired result, nor to resort to grounds of public policy in order to construe a statute to intend such."[11] Neither single debtors nor co-debtors can restrict their liability to certain specific assets, by merely hanging up a notice of their intention. There must be an express stipulation to that effect in the contract with the creditor.[12]

Since stockholders are co-debtors, after judgment is obtained against the group, each is liable severally for the whole debt—within the limit of his restricted liability—and therefore a creditor need not join all the associates.[13] But the principle of marshalling requires that he first exhaust the joint assets, by a return of *nulla bona*, before proceeding against the individual associate. In order to prevent multiplicity of suits, and settle the right *inter se* in the same action, those associates who are sued, have the right to file a bill to have all the other stockholders joined.[14] If the creditor is also an associate, he need only contribute his own pro rata share towards the payment of his own claim;[15] and should not be compelled to pay his own stock balance in full, as a condition precedent to suit.[16]

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[10] *In re Sheffield and South Yorkshire Permanent Bld. Soc.*, 22 Q. B. D. 476 (1889).

[11] *Easton Nat. Bank* v. *Am. Brick and Tile Co.*, 64 Atl. (N. J.) 917 (1906).

[12] *Greenwood's Case*, 3 De G. M. & G. 459 (1854); *Hess* v. *Werts*, 4 S. & R. 356 (1818).

[13] *Bissel* v. *Kty.*, 15 Fed. 353 (1882); *Wilson* v. *Kiesel*, 9 Utah, 397 (1894).

[14] Cook on Corporations (5th Ed.), Sec. 205, p. 405; *cf. Weber* v. *Fickey*, 47 Md. 196 (1877).

[15] *Hatch* v. *Dana*, 101 U. S. 205 (1879).

And since as a creditor he need not join all his associates, the whole claim of the associate will be apportioned among those before the court, the creditor-associate contributing his own proportion. *Blood* v. *La Serena Land and Water Co.*, 89 Pac. (Cal.), 1090 (1907).

It is submitted that such a decision cannot be satisfactorily explained, if the entity is regarded as the debtor, unless some other theory than the two above mentioned, is discovered. If we regard the associates as the debtors, the case needs no explanation. The same result has been reached in cases where the associates are admitted to be co-debtors—viz. partners.[20]

Municipal Corporations.

Right of City to Dispose of Surplus Electric Power for Private Purposes.

The general form of government in the United States, with its three-fold division of powers, exercised by the legislative, the executive, and the judicial departments, early influenced the courts in favor of the view that the functions of each department, were, except, perhaps, in extreme situations, to be exercised independent of the others and free from interference by them, and that there existed, therefore, a point beyond which the judicial department could not go in regulating the acts of either the legislative or the executive branches.[1]

This rule has been held applicable to the acts of municipal corporations, which are but sub-divisions of the sovereign government, with powers delegated by the Legislature, and hence the Supreme Court of New York refused to reverse, on *certiorari*, the proceedings of a municipal corporation relating to certain street improvements, where it appeared that it had acted within the scope of the authority conferred by a statute of the Legislature, and had complied with the forms which the statute required.[2]

And this same Court held that "Courts of Equity have no general supervisory power over the government of municipal corporations or over acts and proceedings of their governing bodies . . . . except where it is shown that the rights of an individual have been injured or menaced in a matter falling under some recognized head of equity, and which it is the peculiar province of a court of equity to prevent or redress."[3]

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[20] *In re Professional Life Assurance Co.*, L. R. 3 Eq. Cas. 668 (1867).

[1] *Marbury* v. *Madison*, 1 Cranch, U. S. 137 (1803); *Rees* v. *City of Watertown*, 19 Wall. U. S. 107 (1873).

[2] *Ex parte Mayor, &c. of Albany*, 19 Wend. N. Y. 277 (1840).

[3] *Phelps* v. *City of Watertown*, 61 Barb. N. Y. 121 (1871).

Where, however, the exercise of a legislative function by a body having but a delegated power contravenes the authority derived from the supreme governing body, the courts have not hesitated to intervene for the purpose of safeguarding the welfare of parties whose rights were injuriously affected;[4] or to prevent funds raised for specific purposes or from specific activities, from being diverted into general channels.[4]

The Court of Civil Appeals of Texas has recently applied the general rule to a situation which marks a modern and growing tendency in municipal activity. *Crouch* v. *City of McKinney*, 104 S. W. Rep. (Tex.) 518 (1907.)

The City of McKinney, acting under legislative authority, had issued bonds for the purpose of establishing a public electric lighting system in the city. The funds thus procured were insufficient, however, to extend the system throughout the city's territorial limits, but to the extent that the system was in operation, the lighting plant was adequate to supply sufficient power and to have a surplus. This surplus it purposed disposing of to private parties for compensation, and to use current funds of the city to effectuate this purpose. The lighting plant had been installed in conjunction with a municipal water plant. The McKinney Electric Light & Motor Power Company, which had previously received from the city a franchise to install a lighting plant and supply private parties with light and power, sought to restrain the city from thus disposing of its surplus electricity.

The Court, in refusing to enjoin the city, held that, "So long as the affairs of a city are conducted by its council in a reasonably judicial manner, its acts will not be interfered with by the courts, unless it is transcending its powers, or a clear right has been withheld, or a wrong perpetrated or threatened," and that the city "may, after discharging its duty to the public, sell its surplus electricity to private citizens for lighting."

It was further held that, "The surplus of the proceeds of a municipal water works system remaining after the payment of the expenses of maintaining the system as installed, are current funds, and the city may divert the same to other needs of the city."

The decision would seem to be a much desired step in favor of the successful administration of municipal affairs where relief from stringent situations is possible by such use of the city's funds, otherwise unavailable, except through the usually tedious medium of legislation.

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[4] Cent. Dig. (Am. Ed.), vol. 36, tit. Munic. Corp., Secs. 1868, 1869.

RECENT CASES.

ADVERSE POSSESSION.

Tax Deed: Color of Title

A tax deed void because it shows that several lots in a town were sold at one sale and that the county purchased them as a competitive bidder is void on its face and not admissible in evidence to show color of title to support adverse possession under a statute of limitations. Supreme Court of Oklahoma in *Kellar* v. *Hawk*, 91 Pacific Reporter, 778.

This case follows the rule expressed by the Supreme Court of the United States in *Redfield* v. *Parks*, 132 U. S. 239.

Several jurisdictions hold that a tax deed though void on its face may show color of title. See *Pharis* v. *Bayless*, 122 Mo. 124, and *Wilson* v. *Atkinson*, 77 Cal. 485.

There is also confusion as to what is necessary to make a deed void on its face.

It has been held that an instrument must be so obviously defective that no man of ordinary capacity would be misled by it. See *Anent* v. *Arrington*, 105 N. C. 390.

CARRIERS.

Duty of Carriers: Protection From Insult

The plaintiff brought action for damages against Georgia Railroad & Electric Co., for an insult by the conductor of said company, alleged to have been committed by the latter in compelling the plaintiff, a white man, to sit in a portion of a car reserved, by a police ordinance, for negroes, thus publicly intimating that he was a negro, or of African descent. *Wolfe* v. *Georgia R. R. & Electric Co.*, 58 S. E. Rep. 899 (Court of Appeals of Georgia—Oct. 3, 1907). Two points are considered by the Court: (1) Is the defendant street car company liable for insulting conduct on the part of its servants, and (2) is it an actionable insult to call a white man a negro? A street railroad is answerable in damages for the insulting conduct of one of its drivers toward a passenger. *Goddard* v. *Grand Trunk R. R.*, 57 Me. 202. *Gillespie* v. *Brooklyn Heights R. R.*, 178 N. Y. 347. "The present decision accords with the trend of cases which hold the care of carriers in respect to passengers one of peculiar responsibility and delicacy. Their contract with him is not for mere room and personal existence—but for respectful treatment and that decency of demeanor which constitutes the charm of social life; and that acts need not amount to an assault and battery before the law takes sognizance." *Chamberlain* v. *Chandler*, 3 Mason (U. S.) 242.

CARRIERS (Continued).

The second point affords more difficulty. Is it actionable to call a white man a negro? The distinction of the social status of the different classes of citizens has been quite generally recognized throughout our legislation. This difference of races adverted to is recognized almost universally by the laws against inter-marriage. Ex Parte Hobbs, 1 Wood, 537; by the laws for the separation of passengers by common carriers, *Plessy* v. *Ferguson*, 163 U. S. 544; and in the separation of the school children, *Cisco* v. *The School Board*, 161 N. Y. 598. These decisions are based upon the intrinsic differences between the two races, not on the ground of inferiority or inequality. The Court in the case in hand rests its decision, that it is an actionable insult to call a white man a negro, upon the same basis.

Liability of Railroad Co. for Acts of Conductors

Plaintiff held a ticket from stations A to B; when the conductor took up her ticket he agreed, at her request, to stop the train at an intermediate point and assist her to alight. The train stopped at the agreed point, but the conductor failed to assist the plaintiff. There was no platform, plaintiff fell and was injured. Held, these facts did not show negligence on the part of the railroad company.

Appellate Court of Indiana, in *Sellers* v. *Cleveland, etc., Ry. Co.*, 81 N. E. Reporter, 1087.

This cases decides that it is outside the scope of a conductor's employment to make agreements with passengers to let them off at points not on the train schedule.

If injury had been caused to a person other than the party with whom the agreement was made, it would seem the company would be liable; *Quin* v. *Powers*, 87 N. Y. 540.

That a conductor is authorized to make contracts with passengers to let them off at points not on the train schedule was held in *R. R.* v. *McCurdy*, 45 Ga. 288, and *R. R.* v. *Young*, 51 Ga. 489.

CONSTITUTIONAL LAW.

Right of State to Expel a Foreign Corporation: Reasonableness of R. R. Rates

The Legislature of Alabama passed a statute providing that the instituting of a suit by a foreign corporation, in a Federal Court, "shall *ipso facto* forfeit all its right or license to engage in or carry on said business, originating and terminating in this State, of freight or passengers, and its right or license to engage in or carry such business, in this State, shall by said Act be revoked, or shall cease." Other statutes were passed

CONSTITUTIONAL LAW (Continued).

making two and one-half cents per mile, the maximum rate for intra-state passengers, fixing the maximum intra-state freight rates on certain articles, and providing that the rate in force January 1, 1907, should be the maximum intra-state rate on articles other than those mentioned. *Held*, that the statute first mentioned above is contrary to the Constitution of Alabama, which gives the right to all corporations to sue in all courts. That, while a State may arbitrarily expel a foreign corporation, yet if it solicits that corporation to come into the State, to do certain acts and enter into contracts suggested by itself, and those acts have resulted in contracts, vesting in the corporation title to property and the right to use it, the State will be taken to have waived its right to expel without cause. A statute passed expelling such a corporation, deprives the corporation of its property without due process of law, impairs the obligation of contracts entered into at the solicitation of the State, is a breach of an implied legislative contract existing between the corporation and the State and is a refusal to give equal protection of the laws to both foreign and domestic corporations. Further, the Court found that sufficient had been shown by the complainant railroad, to overcome the burden on its part of showing the rate unreasonable. *Seaboard Air Line* v. *Railroad Commissioners*, 155 Fed. 792. See *Perkins* v. *Railroad*, 155 Fed. 445.

CORPORATIONS.

Dividends: Scrip-Dividends: Income and Principal: Life Tenant: Remainderman

A trust deed was executed, making A trustee to receive any dividends of certain stocks, whether in money or scrip of any description, and pay over the same to the tenant for life, with remainder to B or his heirs. Dividend obligations were issued. In a contest between the tenant for life and remainderman *held*, these obligations must be regarded as part of the income and therefore become the property of the tenant for life. (Robinson's Trust, 218 Pa. 481.)

This decision is in line with Pennsylvania rulings. The leading case on this question is Earp's App. (28 Pa. 368), which, however, did not go to the extent of the principal case. In Earp's Appeal the enhanced value of the stock and accumulated profits prior to the testator's death was considered as belonging to the principal, and only such stock, issued from profits amassed subsequently, was regarded as income. In the principal case no distinction appears to be made in this respect. Both cases are *contra* to the English view. *Hoopes* v.

CORPORATIONS (Continued).

Rossiter, 1 McClel. 527; *in re Barton Trust*, L. R. 5 Eq., 238. Massachusetts courts, in following the English rule, have held that dividends of stock (to which dividend obligations are essentially similar, except for the lack of voting power), accrue to the remainderman. *Minot* v. *Paine*, 99 Mass. 101; *Balch* v. *Hullett*, 10 Gray, 408. While in New Jersey (*Van Doren* v. *Olden*, 19 N. J. L. 117), and in New York (*Clarkson* v. *Clarkson*, 18 Barb. 646; *Simpson* v. *Moore*, 18 Barb. 638; *Lowry* v. *Farmers' Loan and Trust Co.*, 172 N. Y. 137), the cases seem to adhere to the doctrine of the present case. However, in both the last mentioned jurisdictions, masters are appointed to determine the quantum of stock issued from increased value, from the income or earnings, and whether from earnings previous or since the investment.

Liability on Unpaid Stock Subscriptions

A creditor of a corporation being himself a stockholder therein, instituted proceedings against some only of the stockholders to enforce payment of their unpaid balances. It was objected that all must be found as defendants. *Held*, the plaintiff need not join all the stockholders as defendants, and the whole claim will be apportioned among those before the Court, the plaintiff paying his own pro rata share. *Blood* v. *La Serena Land & C. Co.*, 89 Pac. 1090 (Cal.) 1907. See note appearing elsewhere in this issue.

CRIMINAL LAW.

Evidence; Identification by Voice Alone

Witness was attacked at night from behind; she did not see her assailant, but he spoke a few short sentences. She became insensible without having seen him. Several days later a number of suspects were made to speak within the hearing, but not the sight of the witness. She identified the accused by his voice. He was a complete stranger. *Held*, this evidence admissible not as mere matter of opinion, but as direct and positive proof of a fact and its probative value is a question for the jury. The Supreme Court of Florida in *Mack* v. *State*, 44 Southern Reporter, 706.

The rest of the evidence on which the accused was convicted was purely circumstantial. The decision is supported by *Commonwealth* v. *Williams*, 105 Mass. 62, and *Commonwealth* v. *Hayes*, 138 Mass. 185, though in both these cases the witness had heard the accused speak at least once prior to commission of the crime.

EVIDENCE.

Two questions are raised in the case of *State* v. *Baruth*, 91 Pacific, 977 (Supreme Court of Washington, Oct. 10, 1907), as to the admissibility of statements against defendant made by the deceased—(1) while the defendant was present and hearing, and (2) while the defendant, accompanied by a third party, was in an adjoining room, the door between being closed, but heard what the deceased spoke—in fact commented to the third person on the statements being made by the deceased in the adjoining room. The Court held that the statements made while the defendant was in the presence of the deceased, under such circumstances as she would be reasonably expected to reply thereto, were admissible; but that all statements made by the deceased after the defendant went into the adjoining room with the third party were inadmissible even though she heard the further accusations, understood and commented on them.

Statements Calling for Denial: Presence of Defendant

While the general practice is to admit such evidence only where the accusations are made under such circumstances that the defendant would be reasonably expected to reply, yet this decision goes to the extreme in holding the evidence inadmissible under the facts of the case. The fact that the defendant listened to the statements of the deceased and commented thereon to the third person in her presence, thus showing that she both heard, understood and believed that the third person heard, should overcome the contrary presumption created by the physical barrier between the accuser and the defendant. Clearly the abuse of discretion by the lower Court in admitting such statements was not such as to give grounds for reversal of judgment by the appellate court.

GIFTS.

B gave his wife, the defendant, the contract of sale to T, of a certain plot of ground, together with the deed, directing her to place the same in escrow in her name, until the payment of the purchase money by T. The defendant did as directed. It was *held* that as between the defendant and her step-son this constituted a valid *donatio causa mortis*. (*Davie* v. *Davie*, 91 [Wash.] 950.) The points raised by the contestants of the gift were among others: (1) the insufficiency of the delivery; (2) the futility of an attempt to convey a gift of land orally. The second ground of contention was met by the rule of law, which, in a contract for the sale of real estate, operates as a conversion of the same, by changing the title of property in the vendor to a personal right to the pro-

Causa Mortis: Delivery

GIFTS (Continued).

ceeds of the sale (*King* v. *Ruchering*, 21 N. J. Eq. 599; *Bender* v. *Luckenback*, 162 Pa. 18).

The disposal of the question of delivery was perhaps less aptly or satisfactorily accomplished. In *Phinny* v. *State*, 36 Wash. 236, a case upon which the Court placed great stress, the chief reason for the decision was that inasmuch as the rights of a creditor were not at stake, the doctrine of constructive delivery should be given wide license and latitude. The Court in the principal case saw, therefore, in the handing over of the contract of sale and the deed, a constructive delivery, considering it preposterous to require the delivery of that which was not then in existence and could not, therefore, be physically transmitted. In *Waite* v. *Grubbs*, 43 Ore. 236, an oral gift of money buried at various places on a farm was held a good *donatio causa mortis*. The case under dicsussion, while in line with this, seems to carry the doctrine of constructive delivery to its ultimate bounds and beyond, *Pennington* v. *Gittings* (2 Gill & Johnson [Md.] 208).

Quaere: might not the principal case be upheld on the ground that the delivery of the written evidence of a chose in action will constitute a valid *donatio causa mortis*, regarding the contract of sale as such evidence?

INSURANCE.

Life Insurance: Beneficiary: Designation of Beneficiary: Vested Interests

The question arose as to whether A, the deceased, could, after designating his wife as the sole beneficiary of a policy upon his life, with no provision as to substitution or alteration after the death of the beneficiary change the same for the benefit of his daughter, the plaintiff. It was *held* that immediately upon the issuance of the policy the beneficiary interest vested in the wife, and could not be divested by A without her consent or that of her representatives after her decease. (*Smith* v. *Ins. Co.*, 34 Super. Pa. 72.)

This decision is in accord with the doctrine on this question. The instant a policy is issued the interest of the beneficiary becomes vested; *Glanz* v. *Gloeckler*, 104 Ill. 573; *Gould* v. *Emerson*, 99 Mass. 154; *Scott* v. *Dickson*, 108 Pa. 6.

Hani v. *German Life Insurance Co.*, 187 Pa. 276, coincides directly with the principal case.

The second portion of the decision has been followed generally; *Washington Central Bank* v. *Hume*, 128 U. S. Rep. 195; Anderson's Est. 85 Pa. 202.

One of the theories upon which an opposite conclusion has been reached is, that, this is a chose in action, which, like all

INSURANCE (Continued).

choses of the wife not reduced to possession during the joint lives of the husband and wife, passes to the former if he survive, and upon the death of the wife may be disposed of by him; *Olmsted* v. *Key*, 85 N. Y. 593. Another theory is that since the whole object in procuring the policy and paying the premiums was to protect the wife, upon her death the object ceasing, he could dispose of the beneficiary interest by will or otherwise; *Kernan* v. *Howard*, 23 Wis. 108. The last mentioned decisions have not, under statutes, been followed in their respective jurisdictions, 95 N. Y. Supplement, 780; *Conterby* v. *Ins. Co.*, 102 N. W. 1096.

MUNICIPAL CORPORATIONS.

Disposal of Surplus Electric Power

A city issued bonds under legislative authority for the purpose of establishing a public electric lighting system. The funds thus procured were insufficient, however, to extend the system throughout the city's territorial limits, but to the extent that the system was in operation the plant was adequate and there was surplus power. The city proposed to dispose of the surplus power to private parties for compensation, and to use current funds of the city to effectuate this purpose. A private company having previously received from the city a franchise to install a lighting plant and supply individuals with light and power, sought to restrain the city from thus disposing of its surplus electricity. *Held*, the city might so dispose of its surplus power. See note appearing elsewhere in this issue.

NEGLIGENCE.

Contributory Negligence of Child Under Ten

A child eight and one-half years of age was run down by a trolley car at a crossing, the evidence tending to show that the car was negligently operated. The child had crossed the track, and being frightened, turned back when the car was less than fifty feet away and was injured in attempting to recross the track.

Held, that the question of contributory negligence on the part of the child was for the jury, and that the trial Judge properly refused to non-suit the plaintiff.

The degree of care required of such a child is to be determined by *her* maturity and capacity; *Smith* v. *North Jersey St. Ry. Co.*, 67 Atl. Rep. 753. The same rule prevails else-

NEGLIGENCE (Continued).

where; *Railroad Co.* v. *Stout;* 84 U. S. 657; *Birge* v. *Gardiner,* 19 Conn. 507. In other jurisdictions the degree of care required is that exercised by *ordinarily careful* children of the same age under like circumstanees; *Munn* v. *Reed,* 86 Mass. 431; *Strudgeon* v. *Village of Sand Beach,* 107 Mich. 496. The plaintiff is required to prove affirmatively that the child was in the exercise of due care; *Hayes* v. *Norcross,* 162 Mass. 546.

In cases where the degree of contributory negligence was no greater than in the case under discussion, the question was not allowed to go to the jury; *Hayes* v. *Norcross, supra; Miles v. Railroad Co.,* 4 Hughes (Fed.) 172.

Liability of Wholesaler to Consumer

A declaration averred that the defendant negligently put diseased ham into a can and sold the same to a retailer; that the plaintiff purchased the same and was made sick by eating the ham. Demurrer. *Held,* the demurrer was sustained on the ground that there is no implied warranty of wholesomeness by a manufacturer in the sale of food to a retail dealer; *Tomlinson* v. *Armour,* 65 Atl. Rep. 833 (N. J.). See note appearing elsewhere in this issue.

SALES.

Bailment or Conditional Sale: Parol Testimony

Plaintiff, after failure on part of his prospective vendee to complete a contract of sale for certain cars, leased in writing the cars, to the said prospective vendee, with right of purchase. These cars came into the hands of the defendant, claiming through the original lessee. *Held,* that the instruction of the Court below that the writing created a bailment and not a sale, submitting to them at the same time, the question whether the written agreement contained the real contract of the parties, or the transaction was really a sale, was correct; *American Car Co.* v. *R. R.,* 218 Pa. 519. The first part of the instruction was in line with the established principle that a lease with a right to purchase, passes no title to the property, but merely gives the right to purchase at the expiration of the lease; *Powell* v. *Eckels,* 96 Mich. 538. The instrument being unquestioned and unambiguous in itself, could not be varied by parol testimony; *Andrews* v. *Mann,* 92; Ill. 40. As the testimony admitted was not to vary the written instrument, but to show whether the instrument represented the real agreement between the parties, the conclusion reached by the Court seems correct.

WILLS.

Testamentary Capacity: Belief in Spiritualism as Evidence

A testator devised his property to trustees to establish and maintain a Spiritualist church and library. He was a Spiritualist of a pronounced type, believing in many impossible occurrences; *e. g.*, that his mother, long since dead, was in the habit of coming to his room and kissing him good-night, and that his son, who died in infancy, had grown to manhood in spirit land and had recently appeared before the testator and patted him on the cheek, etc. The belief was in accordance with the articles of faith of the Illinois Spiritualist Association, and the testator specifically denied in his will that he was influenced by "spirits," although strong evidence to the contrary was srown at the trial. *Held*, that there was not a scintilla of evidence of insane delusion which might have rendered the deceased incapable of testamentary capacity, nor of any undue influence, and that the question ought not to have been submitted to a jury; *Owen* v. *Crumbaugh*, 81 N. E. Rep. (Ill.), 1044.

That a mere belief in spiritualism does not, *ipso facto*, constitute an insane delusion, rendering the believer wanting in testamentary capacity, is well established; *in re Spencer*, 96 Cal. 448; *Brown* v. *Ward*, 53 Md. 376. The present case, however, is, it is believed, an extension of the doctrine which cannot be supported on principle or by authority. The conclusion on the facts is inconsistent with the tests laid down in the decision itself. See paragraphs 1 and 2, page 1051. An exactly opposite conclusion was reached by the Supreme Court of Indiana only a month earlier; *Steinkuehler* v. *Wempner*, 81 N. E. Rep. 482, and the same result was independently reached in Michigan a month later; *O'Dell* v. *Goff*, 112 N. W. 736. The reasoning of the courts of Indiana and Michigan is supported by the weight of authority; *Robinson* v. *Adams*, 62 Maine, 369; *Thompson* v. *Hawkes*, 14 Fed. 902.

On principle, it is submitted, no reason can be assigned for taking from the consideration of the jury evidence of delusions (in the mind of a testator), which cannot be accounted for on any rational basis, merely because such delusions are in harmony with, or even constitute, a certain religious belief.

For an extreme view, contrary to this case, see *Lyon* v. *Home*, L. R. (1868) 6 Eq. 653, 692.

BOOK REVIEWS.

A TRUSTEE'S HANDBOOK. By AUGUSTUS PEABODY LORING. Third Edition. Boston: Little, Brown & Company. 1907. Pp. xxxvi, 222.

It seldom happens that a volume intended for both lawyer and layman is truly valuable to either or to both. This Trustee's Handbook is, however, undoubtedly an exception to this rule. It contains within remarkably brief compass a summary of those points of law relating to trusts which demand prompt consideration in the daily routine of any large office. No attempt is made by the author to establish by detailed reasoning the legal basis of his conclusions, but the book bears such evidence of care and accuracy in its preparation that the busy lawyer who desires primarily to refresh his memory on some possibly rather elementary question can safely rely on it as an authority. For the layman charged with the duties and responsibilities of a trustee, this volume will prove of invaluable assistance. The absence of legal verbiage, the terseness of the style and the systematic arrangement of subjects will alike commend the book to him. The discussions of the troubling questions of the powers of a trustee to invest in the various classes of securities, of his responsibilities to the beneficiary, of his liabilities to strangers who deal with him as trustee,—are all not only illuminating, but also extremely useful. If every trustee would adopt the plans outlined by Mr. Loring as a result of his own wide experience in handling trust estates the result would inevitably be beneficial alike to the *cestui qui trust* and to the trustee.

R. D. J.

THE LAW OF CONDITIONAL SALES. By FRED BENSON HARING. New York: The Ronald Press. 1907. Pp. ix, 370.

This useful little volume which the author terms a "Manual of Procedure," is rather a concise digest of the statutes and decisions of the fifty States and Territories relating to conditional sales. No one who has struggled with the problem of frequent occurrence to the busy practitioner, of deciding on an instant's notice the rights of a conditional vendor of merchandise, and the most effective method of securing those rights against the creditors of an insolvent vendee, will fail to appreciate the value of this book. The law as to conditional sales in

each jurisdiction is succinctly, but very clearly, set forth under a comprehensive scheme of subject headings, such, as for example, in the case of Pennsylvania,—"Legal Status of Conditional Contracts of Sale," "How Executed," "Acknowledgment of Proof," "Recording and Filing," etc. No effort has been made by the author to present arguments in favor of, or contrary to, the decisions of the courts, even when conflicting, on the various subjects. The result of this wise avoidance of a fault all too common in books of this character is that the author has been able to adequately state the law within a small compass. It is, however, to be regretted that his treatment of the subject did not in every instance include a reference to the law of each State on the special, but important question of leases and conditional sales of railroad rolling stock. Occasionally, as in the chapter on Pennsylvania, he refers to the special acts on this subject, but in other States, *e. g.* Illinois or Kentucky, no mention is made of the equally important statutes.

R. D. J.

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THE LIMITATIONS OF THE ACTION OF ASSUMPSIT AS AFFECTING THE RIGHT OF ACTION OF THE BENEFICIARY.

(Continued from Volume 53, page 127.)

> That you may know
> 'Tis no sinister nor no awkward claim,
> Pick'd from the worm-holes of long vanish'd days,
> Nor from the dust of long oblivion rak'd,
> He sends you this most memorable line,
> In every branch truly demonstrative;
> Willing you overlook this pedigree:
> And, when you find him evenly deriv'd
> From his most fam'd of famous ancestors,
> Edward, the Third, he bids you then resign
> Your Crown and Kingdom, indirectly held
> From him the native and true challenger.
>
> King Henry V, Act. ii, Scene i.

In previous issues of this periodical the writer has traced the right of action of the beneficiary of a contract from the period of Edward III to the end of the reign of Elizabeth. The cases therein presented plainly show that there were three different forms of action successfully employed by the beneficiary—(1) the Action of Account; (2) the Action of Debt, and later, (3) the Action on the Case. It

has also been shown that in the reign of James I these remedies all existed and were concurrent.

The first part of the present paper will be devoted to a more detailed examination of the judicial reasoning which enlarged the remedy of the beneficiary, (1) by giving him the writ of Debt in addition to the writ of Account, and (2) by further adding to these two remedies the third alternative remedy of an Action on the Case.

In the second part of this paper the writer's purpose is to trace these three cumulative and concurrent remedies from the beginning to the end of the seventeenth century.

By what reasoning was an Accountability in favor of a third party transmuted into a debt?

It has been previously shown[1] that a force was in operation as early as the middle of the fifteenth century impelling the accountee to employ the writ of Debt rather than the writ of Account. One motive was doubtless his desire to avoid the cumbersome procedure of the two trials attendant upon the action of Account—the first trial being before a jury to determine the defendant's liability to account as receiver, and the second trial being before auditors to ascertain and state the account. Another potent motive was to fix upon the defendant an absolute liability; for if the defendant could be shown to be a debtor of the plaintiff the defences available to a receiver were inadmissible.[2] The plaintiff-accountee successfully argued in the sixteenth century[3] that if before action was brought he had demanded an account from the defendant, and the defendant had neglected or refused to furnish it, the plaintiff was entitled

[1] See 52 Am. Law Register, pp. 771, 772.

[2] The defences are collected in Comyn's Digest. Title, "Accompt."

[3] Sir Robert Brooke, who was chief justice of the common pleas, 1554-1558, thus abridges (Brooke, Dett, 129) a decision rendered in 1573, in Y. B. 36 H. 6, 9. "Debt by Wange & Bittinge, where ten pounds is paid to W. N. to my use I shall have action of Debt or of Account against W. N."

Clark's Case, Godbelt, 219 (1612); Ames' Cases on Trust, 4 in the Common Pleas Records: "Note it was said by Cook, C. J., and agreed by the whole court, and 41 and 43 E. 3, etc. That if a man deliver money unto I. S. to my use, that I may have an action of Debt, or Account against him for the same at my election."

thenceforth to treat the defendant no longer as his receiver[4] but as his debtor. Two centuries later we find Lord Holt still recognizing this practice.[5]

When a beneficiary to whom the defendant was accountable as receiver by reason of the receipt of property delivered to the defendant by the hands of another brought an action of debt the plaintiff was obliged to declare first that the defendant was accountable to him as his receiver for that the defendant had received property from another for the benefit of the plaintiff, and, second that the defendant by refusing to account had become the plaintiff's debtor. The alternative remedies of account and debt became available to the beneficiary-accountee from about the close of the sixteenth century.[3] The right to employ the writ of Debt as a concurrent remedy was not achieved without some apparent straining of legal terms. To aver that a defendant had received property for the benefit (*al ocps; ad opus*)[6] of the plaintiff and that he (the defendant) thereupon became indebted to the plaintiff was a hard saying to Lord

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[4]Professor Langdell says in II H. L. R., 253, "It seems that a demand of payment by the plaintiff and a refusal or failure to pay by the defendant will establish a conversion and thus enable the plaintiff at his option to maintain debt." * * * "An obligation to account may indeed be converted into a debt and when that is done of course debt or *indebitatus assumpsit* will lie."

[5] In *Poulter* v. *Cornwall*, 1 Salk, 9, *Indebitatus assumpsit* was brought for money received *ad computandum*. The verdict was for the plaintiff, and it was moved in arrest of judgment that no debt had been shown and hence that account should have been brought. *Et per cur.*: "The verdict has aided the declaration, for it must be intended there was proof to the jury that the defendant refused to account, or had done somewhat else that rendered him an absolute debtor."

Jenkins' Centuries, published in 1661, in case lxiv of the sixth century, contains the following: "A delivers £40 to B to be delivered to C and D to be divided between them; they bring two several actions of debt for their respective £20; adjudged that this is well, and affirmed in error." Also T. B., fifth century, case ii.

[6] See 53 Am. Law Register, p. 124.

Coke[7] in the seventeenth century just as it has been to Professor Langdell in the nineteenth.[8] For in debt the defendant has the power to appropriate the property to his own exclusive benefit and profit. How then could a defendant be charged as debtor who had received property for the benefit of another? The King's Bench, not without difficulty, decisively held that the original receivership had by the defendant's non-performance on demand been changed into the relationship of indebtedness.[9] The remedy of debt

[7] In *Baugh* v. *Phillips*, 1 Rolle's Reports, p. 157 (1616), debt was brought by the bailor of cattle to recover monies received from their sale by defendant. Coke, C. J., at first said: "He can have an action of debt in this case. * * * One delivers monies to B to the use of C, C can have action of debt or account for it, so here he can have this action when he receives it to his use." But later in the same case we read: "Coke. I doubt whether this action of debt lies in this manner as it is brought for possibly it will permit a barbarism to grow up, viz., to bring action of debt in nature of an account; but Doderidge thought there was enough on the subject."

[8] Professor Langdell declares that this "*Indebitatus* count for money had and received * * * seems to have been framed in entire forgetfulness that any * * * distinction existed" (*i. e.*, between a debt and an obligation to account), "for it alleges a legal impossibility, namely, that the defendant is indebted to the plaintiff for money had and received by the defendant *to the plaintiff's use*.

"If in truth the defendant is indebted to the plaintiff for money had and received by the defendant, it follows that the money was received by the defendant to his own use; and if the money was in truth received by the defendant to the plaintiff's use, it follows that it is the plaintiff's money, and that the defendant is accountable for it. And yet this inconsistency in the language of the count has never attracted attention."—"A Brief Survey of Equity Jurisdiction," by C. C. Langdell, 2 Harvard Law Review, p. 255 (1889).

[9] *Harris* v. *De Bevoice*, 2 Rolle's Rep., p. 440.

S. C. Cro. Jac., 678 (1625). The report in Rolle is as follows: "Squior delivers money to Peter de Bevoice *ad solvend* to Harris, H. brings Debt against B * * * Dodridge, Justice * * * it is a contract which the law makes * * * so I hold the Action of Debt maintainable * * * Sir James Ley, Chief Justice *Concessit*, when the bailment is to give to another or to pay to another in satisfaction of a Debt or to lend to another, the stranger shall have Debt, but I doubt if when it is to deliver to the other only in this *depositum* * * * Dodridge, Justice, the declaration is, *ad solvendum*, and to what purpose the payment was, whether for the benefit of the first bailor or of the second bailee that will be upon the evidence, and not in the declaration, Ley, it will be clear upon the evidence, wherefore Dodridge, if he does not show better matter, take your judgment." The report of Croke, 688, says: "Wherefore rule was given that judgment should be entered for the plaintiff, unless other cause, &c."

for the accountee was however no ideal mechanism. In the early seventeenth century if the evidence showed a greater or less sum to be due than the declaration in debt alleged, the plaintiff could not have judgment.[10] To avoid using this Procrustean machine accountees sought another remedial writ in the beginning of the seventeenth century.

An examination of the cases of the early part of the seventeenth century will show by what device of pleading and practice the much needed action on the case, under the specific name of *Indebitatus Assumpsit* became a recognized remedy of the beneficiary.

Preliminarily, however, a thorough comprehension must be had of that radical reformation in procedure which occurred at the end of the reign of Elizabeth and is fully expressed in the decision in Slade's Case.[11]

It is now a matter of common knowledge that by a procedural innovation, resting upon a fictitious promise the action on the case was extended to the enforcement of simple debts.[12] This innovation, though slightly antedating Slade's case, was practically contemporaneous with that decision. The resolution in Slade's case having firmly established the principle that every simple common law debt necessarily includes a promise to pay that debt and that the action of case or *indebitatus assumpsit* would lie upon that fictitious promise, the beneficiary of an accountability or debt soon employed this reformed procedure with success.

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[10] In *Baugh* v. *Phillips*, 1 Rolle's Rep., 257 (1616), a writ of debt was brought to recover from the defendant the proceeds of the sale of cattle delivered by the plaintiff to the defendant to sell for what they would bring. The declaration was for £24 8*s*.; but as the verdict was for the plaintiff for £24 and *non debet* as to the 8*s*., the judgment was reversed by the king's bench.

"The count in debt must state * * * the names of the persons from whom money was received to the use of the plaintiff with the amounts of each receipt." J. B. Ames in II H. L. R., p. 57.

By employing this then novel remedy of *indebitatus assumpsit*, "it was enough to allege the general nature of the indebtedness, as for * * * money had and received to the plaintiff's use." J. B. Ames in II H. L. R., p. 57.

[11] 4 Coke's Reports, p. 927 (1602).

[12] J. B. Ames in II H. L. R., pp. 16, 17.

As early, at least, as 1617, the King's Bench (Coke, *C. J.*, and Houghton, *J.*) held that where "a man delivers money to my use * * * I can have action on the case for them."[13] Rolle, *C. J.*, both reported the case in the foregoing language, and in his Abridgment thus commented upon it: "If a man delivers money to B to my use I can have action on the case against B for this money, because I can have action of debt against him."[14] The report of the same case by another hand throws additional light on the origin of *indebitatus assumpsit* in favor of a beneficiary. Under the name of *Babington* v. *Lambert* the case is thus reported by Moore:—"In the King's Bench in an action on the case upon *assumpsit*, in consideration that the defendant had received £24 of divers persons to the use of the plaintiff, he promised to pay it to the plaintiff such a day. And found for the plaintiff. And in arrest of judgment it was moved that the declaration was not good because it is not stated of what particular persons he received the money. But the whole court was against him because it is a consideration executed and so not traversable, wherefore the plaintiff had judgment."[15]

In 1651, Rolle, *C. J.*, rendered a similar decision where, in "an action upon the case upon *assumpsit*" to recover £29 the thing bailed was not money, but goods. "The father gave goods to his son, in consideration that the son should pay the plaintiff in this action £20. It was urged that this can be no consideration for the plaintiff to bring his action because here is no debt due to him. * * * Rolle, *C. J.*, held, that it is good as it is, for there is a plain contract because the goods were given for the benefit of the plaintiff, though the contract be not between him and the defendant, and he may well have an action upon the case, for here is a promise

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[13] *Beckingham* v. *Vaughan*, 1 Rolle's Reports, p. 391; the same case is also reported under the style of *Babington* v. *Lambert*, Moore's Reports, p. 854.

[14] Rolle's Abridgment, p. 7 (N), 2.

[15] Moore's Reports, p. 854.

[16] *Starkey* v. *Mill*, Styles, 296 (1651).

in law made to the plaintiff, though there be not a promise in fact, and there is a debt here; and the *assumpsit* is good * * * judgment was given for the plaintiff."[16] Of the several important principles illustrated by this and a preceding and similar decision [17] of the eminent chief justice[18] not the least important is the principle that the beneficiary may employ case in the form of *indebitatus assumpsit* where a debt has been created in his favor. Rolle, *C. J.*, thus relies, on the one hand, upon the substantive law that a beneficiary is entitled to recover where an accountability or debt exists in his favor,[19] and on the other hand this opinion recognizes that since Slade's case the substantive right may be enforced by the writ of *indebitatus assumpsit*. Twenty-five years before Slade's case the beneficiary of an

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[16] *Disborne* v. *Denabie*, Rolle's Ab., p. 30, pl. 5.

[18] Rolle sat in the common pleas as puisne justice and chief justice ten years, 1645-1655. His learning, impartiality and ability called forth the highest tribute from Sir Matthew Hale, who wrote the preface to Rolle's Abridgment, and therein thus eulogizes the author:

"He was a man of very great natural ability, of a ready and clear understanding, strong memory, sound, deliberate and steady judgment, of a fixed attention of mind to all business that came before him, of great freedom from passions and perturbations, of great temperance and moderation, of a strong and healthy constitution of body which rendered him fit for study and business and indefatigable in it. * * * He spent his time under the bar and for some years after in diligent study of the Common Law, neglecting no opportunity to improve his knowledge thereunto, that from his first admission to the Society of the Inner Temple, which was 1 Feb. 6 Jac. and till his call to be a Sergeant, he had contemporaries of the same Society of great parts, learning and eminence; as namely, Sir Edward Littleton, afterwards Chief Justice of the Common Pleas and Lord Keeper of the Great Seal of England; Sir Edward Herbert, afterwards Attorney-General; Sir Thomas Gardyner, afterwards Recorder of London; and that treasury of all kinds of learning, Mr. John Selden; with these he kept a long, constant and familiar converse and acquaintance; and thereby greatly improved both his own learning and theirs, especially in the Common Law, which he principally intended: For it was the constant and almost daily course for many years together of these great traders in learning to bring in their several acquests therein, as it were, into a common stock by mutual communication, whereby each of them became in a great measure the participant and common possessor of the others' learning and knowledge."—Hale's Preface to Rolle's Abridgment, London, 1668.

[19] See 52 Am. Law Register, pp. 764 to 779.

accountability or debt could not maintain *assumpsit* "because there is no consideration between them."[20]

After Slade's case the test of the beneficiary's right of action in case or *indebitatus assumpsit* is his right to maintain account or debt. As in *Starkey* v. *Milne*[21] the defendant had received goods other than money from the bailor, similarly in 1655 in Thomas's case[22] the property transferred was realty. The defendant had promised a father that if he would surrender a copyhold to the defendant the latter would pay "unto his two daughters £20 a piece." Glynne, *C. J.*, accordingly gave judgment for one of the daughters for £20. The plaintiff's action was here Case.

The *ratio decidendi* of the foregoing cases holding that where the beneficiary could recover in debt he could elect the writ of case or *indebitatus assumpsit* is clear. The resolution in Slade's case having positively settled the practice that case or *indebitatus assumpsit* would lie wherever debt would lie,[23] the accountee or beneficiary by making an unsuccessful demand for an account became entitled to employ the action of case or *indebitatus assumpsit*. The action of *special assumpsit* based upon a detriment incurred by the plaintiff is therefore not to be confounded with Case or *Indebitatus assumpsit* based upon a pre-existing debt.

The employment of the writ of *indebitatus assumpsit* in the seventeenth century, as a remedy where money had been delivered to the defendant for the plaintiff's use has already been very distinctly pointed out by Professor Ames. But the further right to employ the same writ when chattels or lands have been transferred to the defendant "for the plaintiff's use" is equally clear, though at the present day this right is not fully realized. The result has been that all the rights and privileges enjoyed by the beneficiary in account and debt in the sixteenth and seventeenth centuries,

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[20] *Howlet* v. *Hallet* (37 Eliz.) 1 Danvers Abr. 57. pl. 51. In Anonymous, Keilwey, 77a, 77b, pl. 25 (1506), Frowike, J., said: "The stranger has not any other remedy except action of account."

[21] Styles, 296 (1651).

[22] Styles, 461 (1655).

though rightfully cast by descent upon the beneficiary in *indebitatus assumpsit*, have not been claimed by him or have been claimed unsuccessfully. But this disherison of the beneficiary seems wholly unjustifiable. Wherever in the sixteenth and seventeenth centuries the action of debt would lie in favor of the beneficiary, the result must follow that after the resolution in Slade's case there is a concurrent remedy of *indebitatus assumpsit*. The rule of practice is reiterated with surely sufficient frequency in the seventeenth and eighteenth centuries that wherever debt will lie *indebitatus assumpsit* will also lie.[28]

The disherison of the beneficiary from his historic right has in the course of two hundred years, occurred by a procedural blunder readily comprehensible. The result to be anticipated from the practice inaugurated by Slade's case was a confusion between the different kinds of contractual liability where all kinds were enforceable by the same action —the action on the case. That action had been employed since the reign of Henry VII to enforce the special promise based upon a detrimental element called a "consideration."

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[28] *Janson* v. *Colomore*, 1 Rolle, 396 (1617). Here action on the case was brought "and counts that whereas the defendant was indebted to him on an account he was found in arrears so much * * * and Doderidge said that Slade's case is that every debt executory includes an *assumpsit*. * * * And judgment was given for the plaintiff."

Professor Ames, in his "Essay on Assumpsit," II H. L. R., 54, remarks: "*Indebitatus assumpsit* became concurrent with debt upon a simple contract in all cases."

The Exchequer said in 29 Car. II, "Wherever the plaintiff may have an account, an *indebitatus* will lie." *Arris* v. *Stukely*, 2 Mod. Case, 148. This should be understood, however, as meaning that an account had been demanded and refused or neglected to be given under circumstances sufficient to establish a Conversion.

In Hard's Case, 1 Salk. 23 (1702), it is said: "*Indebitatus assumpsit* will lie in no case but where debt lies."

The gambling cases at the close of the seventeenth century well illustrate the use of *indebitatus assumpsit* as a substitute for debt, but not as a substitute for *special assumpsit*. Neither debt nor its derivative *indebitatus* would lie against the loser of a bet. Hard's Case, 1 Salk. 23 (1702); *Bovey* v. *Castleman*, 1 Lord Ray. 69 (1702); *Smith* v. *Aiery*, 6 Modern Case, 174 (1705), where the court said: "An *indebitatus assumpsit* did not lie for money won at play; for that action never would lie but where *debt* would lie." But as debt would lie against the holder of the stakes, *indebitatus assumpsit* would also lie against him. *Rowley* v. *Dod*, Freeman, p. 263 (1679).

The technical and specific name of *special assumpsit* was not always given to that action. Quite frequently the term "action on the case upon an *assumpsit*" was employed. It has already been shown that the action on the case was used after Slade's case to enforce a simple common law debt. The technical name of *indebitatus assumpsit* was not always given to that action. Reporters have generally striven towards abbreviation rather than precise terminology. Finally, the action of *indebitatus assumpsit*, as pointed out by Professor Ames, has been employed by Lord Mansfield, and since his day to enforce a species of obligations not arising from consent; to which obligations the term "*quasi contracts*" has been applied by common usage.[24] The wonder therefore, is not that there ultimately occurred a confounding of the substantive rights expressed by the terms accountability and debt, with the rights expressed by the concept "*special assumpsit*" or by the concept "*indebitatus assumpsit* upon a *quasi contract*," but that two centuries were required to effect the adumbration of the first conception by the two last. Finally, the careless use of the term "consideration" from about the close of the seventeenth century to express both the *Quid pro Quo* of Debt and the consideration in special *assumpsit*—an ambiguity noted by Professor Langdell—has in conjunction with the foregoing causes operated to produce in the nineteenth century a partial eclipse of the law of simple contracts, so that to-day we see but darkly.

When Chief Justice Rolle, harassed, so it is said, by Cromwell's interference with the administration of justice, resigned from the head of the court in 1655, he had served long enough to see the entire law of simple contracts administered under the new procedure—the action on the case. He had himself, as has been heretofore shown, carefully preserved and enforced under this new procedure, the substantive rights of the beneficiary formerly enforceable only by the writ of debt or of account. He had, with true

[24] Ames' "Essay on Assumpsit," II H. L. R., 54, 63.

appreciation of the vital distinction between law and procedure differentiated the action on the case when brought to enforce a debt from that other form of the action on the case which for many years before his day had been used to enforce a special promise or *assumpsit* based upon a consideration. Henceforth, we shall see that Rolle's successors recognized and enforced the right of the beneficiary to an accounting or to a debt arising from a failure to account in whatever form of action he brought his suit—case or *indebitatus assumpsit* or the earlier writs of debt or account. Not until the nineteenth century was "justice strangled in the net of form."

Before tracing the history of the beneficiary's remedy into the eighteenth century a significant fact should be mentioned. During that period when the beneficiary acquired the remedy of *indebitatus assumpsit* he still frequently utilized the older and original remedy of the writ of account. The two remedies were concurrent. The doctrine of consideration had power over neither.

Instances of the persistence of account by the beneficiary occur in 1615, in *Walker* v. *Robson*,[25] in 1637 in *Hughes* v. *Drinkwater*,[26] and in *Goddard* v. *Hoddis*, about 1673.[27]

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[25] Brownlow's Pleadings, Accompt p. 4 (2nd Part., 1654). Here the following were the words of the declaration:

"Ralph Robson late of &c. to answer Brian Walker of a plea that he should deliver his reasonable Accompt from the time that he was receiver of the monies of the said Brian &c. and whereof &c. he saith that when the aforesaid Rich. the last day of July, the year of the Lord 1612 did appear Receiver of the moneys of the said B., that is to say, at London in the Parish of St. Alphage in the Ward of Cripplegate, and then and there received of the moneies of the said B. by the hands of one Tho. Coplet £19 10s. to give an Accompt thereof to the said B. when thereto he should be required to give it. And also when the aforesaid Ral. the day and year abovesaid did appeare Receiver &c as first by the hands of one Milo Walker £24 18s. to Accompt thereof to the said Br. when to that hee should bee required to give it; notwithstanding the said Ra., although often required to give his reasonable Accompts aforesaid to the said Br. hath not as yet given but that to him hitherto &c." Then follows the plea that the plaintiff, B. Walker, and one Milo were partners and that the money received was paid to him. Trial by jury and verdict and judgment for the defendant.

[26] Hutton, 133. In *Hamond* v. *Ward*, Styles, 287 (1651), Rolle said: "Here it appears that the Action is brought against the defendant as a receiver, and if one receive money due to me upon an obligation, I shall

In Coke upon Littleton, 172, it is written, the remedy of Account "against the receiver is when one receiveth money to the use of another to render an account * * * the plaintiff must declare by whose hands the defendant received the money, &c."

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have either an Action of Accompt or an Action of Debt against him, so if he receive my rents without my consent." The action here was debt upon an *insimul computaverunt*.

"In 1673, "A Book of Entries Containing perfect and Approved Precedents of Counts Declarations &c As well in Actions Real as Personal, and sundry other Entries; useful for all clerks, attorneys and Practisers in the Courts at Westminster and inferior Courts, Collected in the Times, and out of some of the Manuscripts of those famous and Learned Prothonotaries Richard Brownlow, John Gulston, Robert Moyl and Thomas Cory, Esquires, by R. A. of Furnival's Inn," published the following declaration in account:

"SUFFOLK, *ss.*:

ROBERT HODGES, late of L. in the County aforesaid, merchant, was summoned to answer John Goddard of a plea that he render to him his reasonable account of the time whereof he was receiver of the monies of the said John, etc. and thereupon, etc. he says that whereas the aforesaid R. in the 12th day of August in the year, etc. 2nd at L., had received the monies of the said John by the hands of Anne Chapman, late wife of T. C. deceased, 16 pounds, to render an account thereof to the said John when he should be requested thereto; nevertheless the aforesaid Robert though often requested, has not yet rendered his reasonable account to the aforesaid John but has refused and still refuses to render it to him. Therefore he says he has been injured and has damage to the amount etc."

In Hil. 21 and 22, Car. II in *Hodsden* v. *Harridge*, 2 Saund. 64, the King's Bench refers to Account as to a thoroughly familiar remedy, saying: "And this case may be compared to the case of an Action of Account, where, if the plaintiff declare against the defendant on a receipt *by his own hands* the defendant shall wage his law, but if the plaintiff declares on a receipt by *other hands* the defendant shall be ousted of his law, on account of the presumption of law that the County had notice of it."

Brownlow's Entries, pp. 2, 3, published in 1693, contains the form of a declaration in account for monies received at the hands of a third person.

Bohun, in his "Institutio Legalis," p. 435, 1732, says: "If one delivers goods to a third person for my use I may either have an Action of Debt or Account for them at my election."

And the same very words appear in "Instructor Clericalis," p. 316, by R. G. a Clerk of the Court of Common Pleas, London, 1724."

"The Attorney's Practice in the Court of Common Pleas," London, 1746, publishes in full a declaration in account against bailiffs of the plaintiff for monies received at the hands of third persons.

William Sheppard, a lawyer [28] of the Lord Protector's party, has left two treatises which show plainly the continued existence of the right of action of the beneficiary in Account and Debt in 1675. In 1653 this author published "The Faithful Councillor or the Marrow of the Law in English," wherein [29] he sets forth the law relating to the action of Account as follows: "It is a writ lying where a Bailiff of a Lord, Receiver, Guardian, or other hath received money or other things of me, or of another for me, for which he ought to render an account, and he doth refuse to do it; by this means he may be compelled to account, and I may recover not only mine own, but Dammages also if there be cause. *Cook upon Littl.* 172, *F. N. B.* 118." [30]

And in the same treatise, speaking still of Account, he says: "If one receive money of another to my use or to pay over to me, and he do not pay it to me, I may have this Action against him, and so may he that delivered the money to him. *Dyer* 22, 57; 18 Ed. 4, 23." [31]

The remedy by Writ of Debt is also viewed as in full vigor: "If one receive money of another to my use, or to deliver to me or from me, to deliver to another, or to bestow for me, and he doth not dispose it accordingly; in all these cases I may have this Action for the money, or I may have a Writ of Account. *Dyer* 21, 42; *Ed.* 3, 9; *Broo* Condition 6, 38 H. 6, 9."

In 1675 appeared by the same author "A Grand Abridgment of the Common and Statute Law of England." [32] Under the title, "Debt," Sheppard echoes the *leit motif* of the Year Books: "If I deliver money to another to repay to

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[28] "The author was the most industrious and learned lawyer of his age, but his adherence to Cromwell, sufficed to consign, almost to total oblivion, a considerable portion of his numerous writings."—*Marvin's Legal Bibliography*, 643, Philadelphia (1847).

[29] P. 18.

[30] P. 22.

[31] Ib. p. 23.

[32] "This is the first Abridgment of the Common Law that appeared in English, and though possessing considerable merit, it scarcely struggled into existence."—Marvin, 643.

me at a certain day, or to keep safe for me; Or another deliver money to him by the command of a third person to my use, and it be not payd me, I may have this Action."[33] Under the title, "Account," this abridger also reiterates the now trite law.[34]

The names given by the pleader in the seventeenth century to distinguish the two varieties of the action on the case, have reference to the different principles of substantive law underlying each respectively and these technical terms must be clearly distinguished before an attempt is made to trace the actions brought by the beneficiary during the seventeenth and following centuries. If a seventeenth century pleader sought to enforce an accountability or debt created for the benefit of the plaintiff by an action on the case he took for his guidance the rule in Slade's case, and in his declaration set forth first, that there was a debt and, second, that the defendant thereupon promised to pay it. The familiar Latin words of the declaration, describing how the defendant, being a debtor (*indebitatus*), thereupon subsequently made a promise (*assumpsit*) furnished a short and appropriate nickname for this species of the action of the case—*indebitatus assumpsit*, often for brevity reduced to the colloquial, *indebitatus*. Thus the pleader's slang pointed out that the substantive law of the contract of debt underlaid the contract, which he sought to enforce by the machinery of an action on the case. With equal deference to substantive law the writ of case, when employed to enforce a simple contract other than a debt, retained, in the seventeenth century, the long familiar name of *assumpsit*. Sometimes this latter species of the Action on the Case is called "Action on the Case upon a special promise," and sometimes *"Special Assumpsit."*

Sir Matthew Hale was born in 1609—seven years after Slade's case was decided, and he died the year the Statute of Frauds was passed. His decision in 1669 that debt will not lie by the indorsee against the acceptor of a bill[35] is most

[33] Sheppard's Abridgment Title Debt, 531.
[34] Ib. Title Accompt, 13, citing Clark's case, Godbolt, 210.
[35] Milton's Case, Hardres, 485 (1669).

instructive. Two years later he delivered an opinion "that the bare acceptance of a Bill of Exchange makes no Debtor; but if B receives money of A and A draws a Bill on him to C in this case *Indebitatus* lieth by A or C not on the Bill of Exchange but on the other circumstances of coming to his use for the plaintiff." "The court conceived an *Indebitatus* will not lie on a Bill of Exchange unless money be delivered to pay over, for then the *Indebitatus* is grounded on the lending, not on the Bill of Exchange.[36]

At the close of the seventeenth century three distinct forms of contractual liability were recognized in the English law of simple contracts—Debt, Accountability and Assumpsit. All depended upon consent, but actual privity of the plaintiff was not essential in the case of Accountability and Debt.

There were many legitimate children of the action of Debt and they were all called *Indebitatus Assumpsits.*

There is a legitimate child of every *Indebitatus Assumpsit* and each is known as a common count. Professor Ames has clearly set forth this pedigree in general,[37] and nothing remains to be done but to note the descent of the right of action of the beneficiary.

A common count, therefore, based on an Accountability and Debt arising from the transfer of money to the defendant by the hand of another for the plaintiff's benefit with the duty of paying him a sum certain, is not a bastard.

Nor should a common count based upon an Accountability and Debt arising from the transfer of chattels or realty to the defendant by the hand of another for the plaintiff's benefit bear to-day in English courts a bar sinister.

Both these counts are the legitimate grandchildren of Debt and not nameless foundlings discovered on the steps of Westminster Hall.

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[36] *Brown* v. *London*, 2 Keble, 695, 713, 758, 822; S. C., 1 Vent. 152. In the latter report of the case Ventris says: "But they said, if A delivers money to B to pay to C and gives C a Bill of Exchange upon B, and B accepts the Bill and doth not pay it, C may bring an *indebitatus assumpsit* against B as having received money to his use."

[37] II H. L. R., 57, 58.

THE COURTS FROM THE REVOLUTION TO THE REVISION OF THE CIVIL CODE.

The Revolution at first caused the utmost confusion in the administration of justice in Pennsylvania. At the beginning of the conflict the influential and conservative element in the province while opposed to the measures of parliament were exceedingly adverse to the idea of a separation from Great Britain. The grievances of the Pennsylvanians were not as great as those of the New England colonists; they had a liberal charter and a satisfactory system of local government, while the proprietary family stood between them and the crown to soften controversies and prevent conflicts of authority; they earnestly hoped for reconciliation and were carried on the tide of revolution sorely against their wills. To accelerate the movement and to get rid of the conservatives, a bold minority, with the moral support of Congress, organized and carried through a revolution in the government of Pennsylvania. A convention called in July, 1776, and presided over by Franklin, drew up a new constitution, which, after considerable opposition, was declared to have been adopted, Penn's charter was discarded, the proprietary government ceased to exist, the old officials and assembly retired and new men took their places.

The Constitution of 1776 was not a satisfactory instrument and was discarded after a fourteen years' trial, but some of its features are worthy of notice. The executive power was vested in a supreme executive council composed of twelve members, one from the city of Philadelphia and eleven from the respective counties. The term of office was three years, and the president and vice-president were chosen from the council by joint ballot of the assembly and council. The president and council were empowered to choose and commission all judges and other officers and fill

vacancies. Every officer of the State was subject to impeachment by the Assembly, the impeachments to be heard before the president and council. The principal judiciary clauses were as follows:

"Section 23. The judges of the supreme court of judicature shall have fixed salaries, be commissioned for seven years only, though capable of reappointment at the end of that term, but removable for misbehaviour at any time by the general assembly; they shall not be allowed to sit as members in the continental congress, executive council or general assembly, nor to hold any other office, civil or military, nor take or receive fees or perquisites of any kind.

Sec. 25. Trials shall be by jury as heretofore, and it is recommended to the legislature of this state to provide by law against every corruption or partiality in the choice, return or appointment of juries.

Sec. 26. Courts of sessions, common pleas and orphans' courts shall be held quarterly in each city and county, and the legislature shall have power to establish all such other courts as they may judge for the good of the inhabitants of the state; all courts shall be open, and justice shall be impartially administered without corruption or unnecessary delay: All their officers shall be paid an adequate but moderate compensation for their services, and if any officer shall take greater or other fees than the laws allow him, either directly or indirectly, it shall ever after disqualify him from holding any office in this state.

Sec. 27. All prosecutions shall commence in the name and by the authority of the freemen of the commonwealth of Pennsylvania, and all indictments shall conclude with these words—*against the peace and dignity of the same.* The stile of all process hereafter in this state shall be *The commonwealth of Pennsylvania.*"

The office of justice of the peace was made elective, the voters of the respective districts to choose two, one of whom was to be commissioned by the president for the term of seven years.

A peculiar feature of the constitution was the provision for the election every seven years of a council of censors who were to meet and inquire whether the constitution had been preserved inviolate, whether the laws were duly executed, and, if there appeared any necessity to amend the constitution, to call a convention for that purpose. While these changes were in progress and while most of the active citizens were engaged in war or political strife, the administration of justice was sadly neglected. The supreme court was closed during 1776, not to resume its sittings until the new court took office in August, 1777.

By an act of January 28, 1777,[1] passed for the purpose of putting into effect such and so much of the laws of the province as were necessary in the commonwealth, it was provided, that the courts of quarter sessions and gaol delivery, petty sessions, common pleas, orphans' courts, supreme court, courts of oyer and terminer and general gaol delivery should be held and kept in each respective county at the times and places appointed by law with all the powers, authority and jurisdiction which by law such justices and judges theretofore had had and exercised and such as were given by the constitution. It was further provided that the president and council should appoint one justice in each county to preside in the respective courts and in his absence the justices who should attend were to choose a president. All actions in the provincial courts were continued in the same state as if the authority of such courts had never ceased.

The chief justice of the new supreme court was Thomas McKean, a signer of the Declaration of Independence and one of the most active of the patriot party. The associate justices were William A. Atlee and John Evans. The suspension of the courts caused considerable inconvenience and letters and petitions complaining of the prevailing conditions were presented to the council.[2] In the counties the same trouble was had with regard to the justices, many of whom were away, or unwilling to act in the unsettled state of affairs; in some parts of the state the local committees of safety assumed judicial power and took cognizance of minor crimes, for example a case involving horse stealing was tried by the committee for Northumberland County in 1777.

The first session of the common pleas, at Philadelphia, when the style and process was altered from king to commonwealth, was held in September, 1777, when six at-

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[1] IX Stat. at Large, 29.

[2] VI Pa. Arch. (1st Series) 228, 245, 294; VII Pa. Arch. (1st Series), 72; IX Col. Rec., 214, 260.

torneys were admitted to practice,[3] but the British were already marching on Philadelphia, and before the end of the month the entry into the city of the army of King George drove from it every vestige of the new government.

During the occupation of Philadelphia by General Howe, from September, 1777, to June, 1778, the seat of government was in Lancaster. With the return of the state officials to Philadelphia the various agencies of proscription became most active.[4] By Act of Assembly numerous persons were declared traitors and their estates forfeited to the commonwealth. The most important cases tried before the newly organized supreme court were treason trials, among which those of Roberts and Carlisle, which are very briefly reported, aroused the greatest popular interest[5] Roberts, a prominent miller of Lower Merion Township, was accused of acting as a guide to Sir William Howe and of persuading various persons to enlist in the British army. Carlisle was specially charged with having accepted a commission to keep watch over the gates of the city of Philadelphia, established by Howe to prevent the ingress and egress of patriots. The accused were tried on the twenty-fifth and thirtieth of September, 1778, found guilty and sentenced to be hanged. An earnest appeal for executive clemency was made to the council on behalf of the prisoners by numerous petitions, but the council was firm and both were hanged. In these, as in most of the other treason trials, James Wilson appeared for the defendants and acquired such unpopularity through his faithful efforts in behalf of his clients that his house was attacked by a mob, which was driven off only after a fight that cost several persons their lives.

The Revolution brought to an end the court of vice admiralty, of which Edward Shippen was judge, and it became necessary to create a tribunal to take its place. The Continental Congress advised the several legislatures to

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[3] Biography of William Lewis, Pa. Mag., vol. xx, 30.

[4] X Col. Rec., 610, 745.

[5] *Resp.* v. *Carlisle*, 1 Dall., 35; *Resp.* v. *Roberts*, 1 Dall., 39, and see IX Col. Rec., 600, 613.

create courts of admiralty and, accordingly, the Assembly, on March 26, 1776, passed a resolution creating a court of admiralty to be held in the city of Philadelphia to try cases of captured vessels brought into that port, with the right of appeal to Congress or to such person or persons as they should appoint to hear appeals.[6] For this purpose a committee was appointed by Congress, whose feeble and unsupported authority was openly defied by George Ross, the Pennsylvania judge of admiralty, in the case of the "Active," giving rise to a memorable controversy carried on in the courts long after the adoption of the Constitution of the United States, and nearly resulting in an armed conflict between the Federal and State authorities. This case or rather series of cases pointedly illustrates the growth of the Federal power, the decree of the helpless commissioners of admiralty of the Continental Congress, long flouted by the State judges, prevailing after many years by virtue of a judgment of the Supreme Court of the United States, to whose authority the State officials, after calling out the militia to resist the marshal, yielded a sullen obedience[7]

Francis Hopkinson, the distinguished writer, who succeeded Ross in 1779, was the first State judge to undergo the unpleasant experience of an impeachment by the Assembly. This proceeding, which took place in December, 1780, was the result of a complaint by the judge against Mathew Clarkson, the marshal of the court, which resulted in his dismissal. Clarkson in revenge made charges against the judge before the Assembly, which voted for his impeachment.[8] The court consisted of President Reed and the council, Messrs. Smith and Galbraith, managing for the House with Attorney-General Bradford, while Judge Hopkinson was represented by James Wilson. The charges against the judge were that he had wrongfully issued a writ for the sale of the cargo of a ship, and that he had

[6] Journal of Congress, vol. i, 260; VIII Stat. at Large, 519.

[7] *Ross* v. *Rittenhouse*, 2 Dall., 160; Olmstead's Case, Brightly's Nisi Prius Rep., 9.

[8] Penna. State Trials (Hogan, 1794).

exacted illegal fees in a prize case. The judgment of the council, as pronounced by the president, was an acquittal upon all the charges, although it seemed to the council that the fees, which were charged according to the recognized practice of the court, were excessive. Upon the adoption of the Constitution of the United States admiralty jurisdiction passed to the district courts and Judge Hopkinson was appointed the first district judge for Pennsylvania under the Act of Congress of September 14, 1789.

The necessity for a court of last resort to take the place of the Privy Council of Great Britain was met by the creation of the High Court of Errors and Appeals, under the act of February 28, 1780,[9] to hear appeals from the supreme court, the register's courts and the court of admiralty.

This act, after reciting that the laws of the late province gave a very precarious, difficult and expensive remedy to parties injured by erroneous judgments, by appeal to the king in council, and that as "the good people of this commonwealth, by their happy deliverance from their late dependent condition, and by becoming free and sovereign are released from this badge of slavery and have acquired the transcendent benefit of having justice administered to them at home and at moderate costs and charges," enacted that a court of error should be established composed of the president of the supreme executive council, the judges of the supreme court, the judge of the admiralty, together with three persons of known integrity and ability commissioned for seven years, any four or more of them to constitute a quorum. The court under this form had but a brief existence, its composition being materially changed by the Act of April 13, 1791.[10] Of the presidents of the council, Reed and Dickinson were leading lawyers and Dickinson rendered at least one very able decision in the admiralty case of *Talbot* v. *Three Brigs*.[11] Benjamin Franklin, although he had once

[9] X Stat. at Large, 52.
[10] 3 Smith's Laws, 28.
[11] 1 Dall., 95.

sat in the common pleas, was wise enough to know that the law required a special education. At least there is no reported opinion by him while president. Of the extra members of the court Edward Shippen, judge of vice admiralty under the crown, subsequently became a justice and chief justice of the supreme court; Francis Hopkinson has been mentioned and Henry Wynkoop was president judge of Bucks County.

That the constitution of 1776 was not working smoothly was the opinion of a majority of the council of censors which met in 1783 to consider whether the constitution was being observed and whether it needed amendment. The committee on defects reported that the commissioning of the judges of the supreme court for seven years only was a material defect, because it rendered the tenure of judges dependent on the will of the council, while the committee on abuses reported that the section requiring fixed salaries for the judiciary had not been complied with as it ought and that permanent salaries should without delay be established for the judges during their continuance in office.[12] The findings of the censors on these and other points were to bear fruit in the constitution of 1790.

In 1786 a new departure was made in the jurisdiction of the supreme court, which hitherto had exercised no original jurisdiction in civil cases except in fines and common recoveries. By an act of that year issues of fact were allowed to be tried *in banc* or at *nisi prius* by that court in the county of Philadelphia.

A case that excited considerable interest at the time was the outlawry of Aaron Doan, one of the famous brothers who terrorized Bucks County and the surrounding country. The defendant, having been attainted of robbery, was brought into the supreme court on September 24, 1784, and after hearing before the court upon several exceptions to the outlawry, all of which were overruled, execution was awarded. When the transcript of the record was remitted to the supreme executive council, in order that a warrant

[12] Constitutional Conventions of Pa., 70, 107.

for the execution should issue, the humanity of President Dickinson seems to have been shocked that a man should be deprived of his life without a trial by jury and, accordingly, a letter was addressed to the supreme court inquiring whether there were any modern instances in England of persons being executed upon outlawry or whether that had ever occurred in Pennsylvania, and was compatible with the constitution. Technical objections to the record were also raised.[13] The court replied that while not bound to give reasons for their judgment and desiring that this should not be construed as a precedent, they gave it as their opinion that under the laws of the commonwealth and the common law they had no doubt that the prisoner had been properly outlawed and had forfeited his life, but could mention no case in Pennsylvania of a person executed upon outlawry by judicial proceedings alone, but that of one Daniel Dawson who had been executed since the Declaration of Independence, in consequence of an attainder, by virtue of a proclamation of the supreme executive council and judicial proceedings thereon, in which the court awarded execution by sentence of death, no judgment having been given before. Dickinson was still dissatisfied and addressed a special message to the Assembly on the subject, but no action was taken at that time and the humane scruples of Dickinson did not influence his successors Franklin and Muhlenberg upon the outlawry of the other Doans, Abraham and Levi.[14] In fact except for the objections to the proceedings, as out of harmony with modern ideas, little sympathy would have been wasted on these desperadoes who, from all accounts, richly deserved their sentences. By an Act of September 23, 1791,[15] the process of outlawry was better regulated, and by the Act of April 22, 1794,[16] the punishment of death was abolished for all crimes except murder in the first degree.

[13] *Resp. v. Doan*, 1 Dall. (Wharton's Ed.), 86.
[14] XV Col. Rec., 505, 544.
[15] 3 Smith's Laws, 37.
[16] 3 Smith's Laws, 186.

This reform was largely due to the efforts of William Bradford, who in that year became a judge of the supreme court, resigning a few years later to accept the office of attorney-general of the United States in Washington's cabinet, and whose brilliant career was cut short by an early death. Prior to this time the minutes of the supreme executive council are burdened with appeals for executive clemency and numerous orders appear for the remission of corporal punishment, as well as of death sentences. That the council had an eye to dramatic effect or were convinced of the value of mental impressions is indicated by one order in which a reprieve is granted to a prisoner "which the sheriff is not to make known to him until he be taken under the gallows."[17] Executions were still public and were attended by vast crowds, drawn by the same morbid curiosity as is exhibited by their descendants who feast on the published details of the so called private executions.[18]

In 1790 a new constitution for the State was drafted and adopted by a convention called for that purpose. The old constitution had many defects and the newly adopted constitution of the United States offered a model which many were eager to imitate. In the new constitution the legislative, executive and judicial powers were distinguished and defined according to the now classic American method, and the State was provided with a governor and a senate as well as an assembly. In remodelling the judiciary, the subject with which we are concerned, a determined but unsuccessful effort was made to establish a court of chancery. The principal changes in the judiciary were embodied in the following clauses of Article V relating to the judiciary:[19]

"Sec. 2. The judges of the supreme court, and of the several courts of common pleas, shall hold their offices during good behaviour. But for any reasonable cause, which shall not be sufficient ground for impeachment, the governor may remove any of them, on the address of

[17] XV Col. Rec., 31.

[18] 12 Haz. Pa. Reg., 117; 13 Haz. Pa. Reg., 4.

[19] Constitutional Conventions of Pa., 301, and 3 Smith's Laws, xxxix.

two-thirds of each branch of the legislature. The judges of the supreme court, and the presidents of the several courts of common pleas shall, at stated times, receive, for their services, an adequate compensation, to be fixed by law, which shall not be diminished during their continuance in office; but they shall receive no fees or perquisites of office, nor hold any other office of profit under this commonwealth.

Sec. 3. The jurisdiction of the supreme court shall extend over the state; and the judges thereof shall, by virtue of their offices, be justices of oyer and terminer and general gaol delivery in the several counties.

Sec. 4. Until it shall be otherwise directed by law, the several courts of common pleas shall be established in the following manner: The governor shall appoint in each county, not fewer than three, nor more than four judges, who, during their continuance in office, shall reside in such county. The state shall be divided by law, into circuits, none of which shall include more than six, nor fewer than three counties. A president shall be appointed of the courts in each circuit, who, during his continuance in office, shall reside therein. The president and judges, any two of whom shall be a quorum, shall compose the respective courts of common pleas.

Sec. 5. The judges of the court of common pleas in each county, shall, by virtue of their offices, be justices of oyer and terminer and general gaol delivery, for the trial of capital and other offenders therein; and two of the said judges, the president being one, shall be a quorum, but they shall not hold a court of oyer and terminer or gaol delivery in any county, when the judges of the supreme court, or any of them, shall be sitting in the same county. The party accused, as well as the commonwealth, may, under such regulations, as shall be prescribed by law, remove the indictment and proceedings, or a transcript thereof, into the supreme court."

The most important changes, as will readily be seen, were the restoration of life tenure to the judges and the grouping of the counties into circuits with a president for the common pleas courts therein, a measure rendered necessary by the growth of the State, particularly in the west. By the appointment of judges learned in the law to preside over the lower courts in the respective circuits some measure of relief was afforded to the supreme court, whose work was becoming increasingly arduous.

By the Act of April 13, 1791,[20] the courts were established in conformity with the new constitution. The supreme court were required to hold three terms a year and courts of *nisi prius* in the intervals. The State was divided into five circuits or districts (increased in 1806 to ten), each comprising a group of counties, and for each district a presi-

[20] 3 Smith's Laws, 28.

dent judge learned in the law was appointed by the governor who, with not less than three, or more than four other persons, commissioned as judges for each of the counties in the circuit, formed for such counties respectively the courts of common pleas, oyer and terminer, quarter sessions and orphans' court. The president and any two of the judges, with the register of wills, comprised the register's court.

In cases involving more than four hundred dollars, a writ of error lay from the supreme court and the register's court to the high court of errors and appeals, which was also remodelled and under this act comprised the judges of the supreme court and the presidents of the common pleas, with three other persons of known legal abilities commissioned in the same manner as the judges of the supreme court. It was further provided that such judges as should have given judgment below should be excluded from sitting on the hearing of that cause on appeal. The high court of errors and appeals sat once a year in Philadelphia. On the organization of this court Benjamin Chew, the provincial chief justice, was named as an extra member and was made president of the court, the other extra places not being filled.

By another act of the same date the salaries of the judges were fixed as follows: Chief justice of the supreme court £1000, associate justices and president judge of first district £600, presidents of other districts £500.[21] When it is remembered that these are not pounds sterling, but Pennsylvania currency, the modesty of these salaries is but too evident. Thirty shillings a day was allowed to each justice of the supreme court for travelling expenses when on circuit. In 1796 the salaries of the associate justices and the president of the first district were raised $400 and of the other presidents $266.67. At the time of the Constitutional Convention of 1837, the salary of the chief justice of the supreme court was $2666 and of the associate justices $2000 each, with an allowance for mileage and expenses on circuit. The judges of the district courts were paid $2000 each, as

[21] April 13, 1791, 3 Smith's Laws, 26.

well as the judges of the common pleas for the first judicial district. In the other districts the president judges of the common pleas received $1600 and the associates $140 with mileage.[22]

In 1779, further changes were made in the jurisdiction of the courts, which for some time were the subject of constant legislative experiments. As the population grew, the impracticability of keeping up the system of *nisi prius* sessions of the supreme court became more and more obvious, while to the suitors and the bar, the hardship and expense of crossing the Alleghenys to attend a session of the court *in banc*, at Philadelphia, in the days before railroads amounted to a denial of justice. But the bar was not yet prepared to give up its cherished traditions and inherited fondness for itinerant justice, and the district courts had not been long enough established to be recognized as the true solution of the problem. The Act of March 20, 1799,[23] therefore provided that instead of *nisi prius* courts, there should be held (except in the county of Philadelphia) circuit courts which were of the same nature as the court of *nisi prius* except that the judges holding the same were empowered to give judgment, pass decrees and award execution in as ample a manner as when sitting *in banc*. The right of appeal to the supreme court was preserved under special conditions.

Although not required by the act by which these courts were constituted, it continued to be the practice, as before, for two judges to ride on circuit and sit together at trials in these courts. This was unnecessary as the time of the judges could have been better distributed by sitting singly on jury trials, while trials conducted by two judges were subject to the same inconvenience as when conducted by the four judges sitting *in banc*, which, as Judge Brackenridge has remarked,[24] caused great delay, as documents offered in evidence had to be read by all the judges in turn and a note taken by each.

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[22] Debates of Pa. Constitutional Convention of 1837, vol. i, 263.
[23] 5 Carey & Bioren's Laws, 694.
[24] Brackenridge's Miscellany, 283.

Trials *in banc* were abolished in Philadelphia by the Act of February 24, 1806 (4 Smith's Laws 270), which also established a Western district for the supreme court which was required to hold its September term at Pittsburg. It was also provided that in the future circuit courts should be held by one judge and that the judges should alternate so that the same judge would not sit oftener than once in the same county in every fourth successive term. The act also abolished the high court of errors and appeals and vested its powers in the supreme court. As respects the common pleas, the state was divided into ten judicial districts and a president judge appointed in each of the new districts. It was further provided that whenever required by either party or counsel the judge should reduce his opinion to writing with his reasons and file the same of record in the cause.

By an Act of April 10, 1807,[25] a middle district was established for the supreme court, the term to be held at Sunbury and again in 1809,[26] two additional districts were established, the Lancaster district and the southern, to be held at Chambersburg. By this act the circuit courts were abolished, and the cases undetermined therein relegated to the common pleas or, where appeals were pending, to the supreme court. The number of judges of the supreme court was reduced from four to three. By another supplement to the Act of 1806, enacted in 1810,[27] the original jurisdiction of the supreme court was restored in Philadelphia County in cases involving over $500, the judges being required to hold *nisi prius* courts there thirty-three weeks in the year.

To dispose of the accumulation of business a new court called the district court was created for the city and county of Philadelphia, by the Act of March 30, 1811,[28] to consist of a president and two assistant judges with power to hear and determine all civil pleas and actions where the sum in

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[25] 4 Smith's Laws, 448.
[26] March 11, 1809, 5 Smith's Laws, 15.
[27] March 10, 1810, 5 Smith's Laws, 158.
[28] 5 Smith's Laws, 223.

controversy exceeded one hundred dollars. The act was experimental and limited to six years, but the court was such an unqualified success that it was continued and finally made permanent, and similar courts were established later in Pittsburg and Lancaster. From the first this court absorbed the most important legal business of the county and acquired an "enduring reputation as a great law court for the trial of civil issues,"[29] the greatest this commonwealth has ever seen; but the names of its most famous judges belong to a later period.

No further experiments were tried with the supreme court until 1826, when an act was passed increasing the number of justices to five and restoring the circuit courts.[30] The cup of that overworked body was now full. They were required to hear all cases of error and appeal sitting in six districts, to hold a court of *nisi prius* in Philadelphia, to go on circuit through the counties, beside exercising original jurisdiction in cases of *quo warranto* and *mandamus*. Relief came in the Act of April 14, 1834,[31] passed on the recommendation of the commissioners appointed to revise the civil code. Circuit courts were finally abolished and the number of districts reduced to four (the eastern at Philadelphia, northern at Sunbury, middle at Harrisburg and western at Pittsburg); courts of *nisi prius* continued to be held twice a year in Philadelphia by a single justice for the trial of civil actions involving more than five hundred dollars, reviewable by the court *in banc* upon motions for new trial or in arrest of judgment.

At the risk of being tedious we have briefly reviewed the many changes in the judiciary system between the Revolution and the revision of the civil code in 1834-36, touching on these acts in but a cursory manner without attempting to point out many important features which were incorporated into later legislation and became a permanent part of the system. In fact our subject, like a snowball, has rolled

[29] Martin's Bench & Bar, 78.
[30] April 8, 1826, P. L., 265.
[31] P. L., 341.

down the years gathering size and has reached proportions beyond control in a single article. The changes that were made were many of them experimental, some met with success others were doomed to failure; they were forced by the extraordinary growth of the commonwealth in population and wealth and the increase in the amount and importance of the business of the courts. The law of real estate still had first place, land was the principal asset of the inhabitants, and the loose methods of the land office were an invitation to litigation, not to speak of the additional complications arising from Connecticut and Virginia titles. Ejectments innumerable occupied the attention of the courts. But commercial law was every day becoming more important, particularly in Philadelphia, then the first city in the country and for some years the nation's capital. The legal profession enjoyed great prosperity during the early days of independence; recklessness and paper money inflation had increased private debts to an enormous extent and this, with the settlement of the loyalists' estates, filled the dockets with more cases than could be tried. This naturally led to envy and jealousy of the bar, which in Massachusetts broke out in riots directed against the courts, an incident referred to in history as Shay's rebellion.

In Pennsylvania there was no open attack on the courts while McKean was chief justice, a sound lawyer and an upright judge, the sternness of whose judicial deportment and whose inflexible courage were sufficient to awe the mob. No one could doubt his devotion to the cause of independence, but if a democrat in theory he was an aristocrat in bearing. David Paul Brown relates[32] that "shortly after his appointment, a petition was presented to him directed to the Right Honorable Thomas McKean, Esq., lord chief justice of Pennsylvania, upon which he complacently observed—'these are, perhaps, more titles than I can fairly lay claim to, but at all events the petitioner has erred on the right side.'" Court was, in his time, opened with great

[32] The Forum, vol. i, 327.

ceremony and form, and the chief justice held the attendants to a rigid observance of duty. There are several cases which illustrate this jealousy of the authority of the court, of which the famous libel case *Resp.* v. *Oswald,* 1 Dall. 319, may be taken as an example, as well as the following incident that occurred in 1778. The chief justice had issued a warrant for the arrest of Colonel Robert L. Hooper, a deputy quarter-master, on a charge of libel. Colonel Hooper informed General Greene, who wrote to the chief justice stating that there was no one to fill the colonel's place and requesting that he might be permitted to enter into a recognizance to appear at court later. The chief justice replied as follows:

"Yorktown, June 9th, 1778.

"Sir:—I have just now received your favor of the 3d inst., and am not a little surprised that the sheriff of Northampton county should have permitted Colonel Robert L. Hooper, after he was arrested by virtue of my precept, to wait upon *you* until he appeared before *me*.

"You say, sir, 'Colonel Hooper waited upon me to communicate his situation, and to know if the circumstances of the army would admit of his absence; but, as the army is just upon the wing, and part of it will, in all probability, march through his district, I could not, without great necessity, consent to his being absent, as there is no other person that can give the necessary aid upon this occasion.'

"I do not think, sir, that the absence, sickness, or even death of Mr. Hooper could be attended with such a consequence, that no other person could be found who could give the necessary aid upon this occasion; but what attracts my attention the most, is your observance that *you* cannot, without great necessity consent to his being absent. As to that, sir, I shall not *ask* your consent, nor that of any other person, in or out of the army, whether *my precept* shall be obeyed or not in Pennsylvania.

"The warrant for the arrest of Mr. Hooper being special, no other magistrate can take cognizance thereof but myself. The mode you propose, of giving bail, cannot be adopted, for many reasons.

"I should be very sorry to find that the execution of criminal law should impede the operations of the army, in any instance; but much more so to find the latter impede the former.

"I am, sir, with much respect,

"Your most obedient, humble servant,

"THOMAS M'KEAN."

In 1799 McKean was elected governor and was succeeded on the bench by Judge Shippen, then seventy years old, who had studied under Tench Francis and at the Middle Temple. Chief Justice Shippen was a patient, practical and discrim-

inating lawyer and it was from his notes that the first reported cases in Pennsylvania were taken. He indeed formed a connecting link between the courts of the province and those of the commonwealth, having sat on the bench during both periods. This very fact, which caused him to be venerated by the bar, was calculated to increase the hatred with which he and his colleagues, Yeates and Smith, were regarded by the radical politicians. These three judges from their wealth and social connections were regarded as representatives of the old aristocracy, while the defeat of the Federalist party, in 1799, left those who had taken office in its day of power exposed to all the dangers of political revenge. The tenure of the judiciary was for life and it filled the earnest partisans of the new democracy with rage to see all the places on the bench filled with those whose sentiments were scarcely less detested than those of the Tories.

The first to be marked for attack was Alexander Addison, president judge of the fifth judicial district which, when formed in 1791, comprised Westmoreland, Fayette, Washington and Allegheny counties, all of the western part of the State. Addison, a Scotchman by birth, had been educated for the ministry, but had changed to the law, and while practicing in the western counties had served as a member of the convention that framed the constitution of 1790. An aggressive Federalist, his views were out of harmony with those of the greater portion of the local population, while his strong opposition to the whiskey insurrection did not increase his popularity with the rough inhabitants of that wild region. It was Addison's habit to deliver political sermons from the bench under the guise of charges to the grand jury. These interminable discourses were published and greatly admired by the Federalists, but detested by the Democrats, who, in attending court as parties or jurors, were obliged to listen respectfully to the heavy campaign literature of their opponents.[23] Judge Addison was particularly fond of dwelling upon the enormities of the French revolu-

[23] See specimens of these charges in Appendix to Addison's Reports.

tionists as a warning to good citizens against those admirers of that revolution who were prominent among the Anti-Federalists. Aside from these foibles, Addison was an able, upright and energetic judge, and had toiled ceaselessly to bring order out of confusion in the western district. His learning was regarded with respect by the bar and his firmness had won the confidence of the better class of citizens. When the party of Jefferson triumphed in 1799, Addison was a marked man. His leading enemy was like himself a theologian who had turned to the law, had built up an extensive practice and had just been appointed to the supreme court, Hugh Henry Brackenridge, of whom more hereafter.

Instigated by Brackenridge, John B. C. Lucas, a Frenchman, and associate judge of the quarter sessions of Allegheny County, attempted to address the grand jury and was prevented by Judge Addison on the ground that in such matters the president judge was the mouthpiece of the court. Lucas brought the matter before the supreme court on a motion for leave to file an information against Addison for misconduct on the bench, but the court declined to interfere, although of opinion that the associate judges had a right to express their opinions.[34] Lucas again attempted, at the court held June 22, 1801, to address the grand jury and was again prevented by Judge Addison with the concurrence of another colleague. The paper Lucas intended to read had nothing to do with the duties of the jury but contained some trifling remarks of a semi-political nature composed perhaps by Brackenridge.[35] For this act Addison was impeached by the House of Representatives on January 26, 1803, convicted by the Senate by a vote of twenty to four and sentenced to be removed from office and forever disqualified from holding the office of judge in the commonwealth. Judge Agnew has described this trial as "the most flagitious ever urged on by vicious hate and obnoxious partisanship" and the conduct of the legislature in this mat-

[34] *Comm. v. Addison*, 4 Dall. 225.

[35] See the printed report of Addison's Trial (1803).

ter has met with general reprobation. Under the circumstances Addison had acted perhaps injudiciously, but his purpose was to preserve the dignity of the court and the punishment he received was unreasonably harsh.

Having tasted blood, the legislature next turned its attention to the supreme court. In February, 1803, a petition was presented to the House of Representatives by one Thomas Passmore, complaining that he had been arbitrarily fined and imprisoned for a constructive contempt of court in violation of the bill of rights and praying for the impeachment of the judges who had taken part in the proceedings. The matter went over to the following session when it was referred to a committee which recommended the impeachment of Chief Justice Shippen and Justices Yeates and Smith, and accordingly articles of impeachment, adopted on March 23, 1804, were presented to the Senate. On January 5, 1805, at Lancaster, then the capital of the State, the trial began. The cause of this impeachment was a proceeding in the supreme court, which will be found reported in the case of *Bayard* v. *Passmore*.[36] The brig Minerva belonging to Passmore, which had been insured in 1801 by certain underwriters including the firm of Petit and Bayard, sprang a leak and put into New Brunswick where Passmore abandoned her to the underwriters. Some of the latter refused to pay on the ground that the vessel was unseaworthy when she sailed. An amicable action was entered and the matter referred to arbitrators, who made an award in favor of the plaintiff. Judgment was entered on the award and a *fi. fa.* issued, but, on motion, the execution was set aside, and a rule granted to set aside the award, on exceptions filed by the defendant. These exceptions were based partly on irregularities in the proceedings and partly on the merits of the case. While the exceptions were pending, Passmore, who seems to have been exasperated at the delay, posted on a

[36] 3 Yeates, 439.

board in the exchange room of the city tavern the following notice:

"The subscriber publicly declares, that Petit and Bayard, of this city, merchants and quibbling underwriters, has basely kept from me the said subscriber for nine months about 500 dollars, and that Andrew Bayard, the partner of Andrew Petit, did on the 3d or 4th inst. go before John Inskeep, esq., aldermen, and swore to that which is not true, by which the said Bayard and Petit is enabled to keep the subscriber out of his money for about three months longer, and the said Bayard had meanly attempted to prevent others from paying the subscriber about 2500 dollars but in this mean and dirty action he was disappointed in; I therefore do publickly declare, that Andrew Bayard is a liar, a rascal and a coward, and do offer two and a half per cent. to any good person or persons to insure the solvency of the said Bayard and Petit for about four months from this date.

"Philadelphia, September 8, 1902.

"THOMAS PASSMORE."

Thereupon Mr. Dallas, the attorney for Bayard and Pettit, moved for an attachment against Passmore for contempt of court, which was granted and interrogatories filed, which Passmore answered. On the issuing of the attachment the court expressed its opinion that an apology was due to the defendants. The answers of Passmore, while disclaiming any intention to treat the court with contempt, and while admitting that the paper had been posted in a moment of irritation, declined to make an apology to the defendants. It was argued that there was no suit pending when the notice was posted, the proceedings having closed with the award of the arbitrators, but the court was unanimously of the opinion that a contempt had been committed and, as Passmore declined to make any atonement to the injured individuals which would influence the court to leniency, he was, accordingly, sentenced to pay a fine of fifty dollars and suffer imprisonment for thirty days. This sentence was carried out.

As the law then stood Passmore was clearly guilty, and even if not, the sentence was given after a patient hearing and full argument and amounted at most to an error of law for which Passmore had a remedy by appeal to the high court of errors and appeals, a point upon which he was advised by William Lewis, one of the leaders of the bar.

But this remedy was not pursued. Passmore paid his fine, served his sentence and sought revenge by the aid of a partisan assembly.

When the time of the trial arrived public feeling had turned in favor of the judges, the better class of newspapers took their side and the bar rallied to their defence; in fact the Assembly found it impossible to procure eminent local counsel to assist them in their odious task and Caesar A. Rodney, of Delaware, was retained for the prosecution. The defendants were represented by Jared Ingersoll and Alexander J. Dallas.

The trial began on the eighth of January, 1805, and lasted until the twenty-eighth of the month.[37] Many witnesses were called and all the litigation which gave rise to Passmore's commitment was minutely reviewed. In summing up Mr. Boileau, one of the managers for the house, argued that Passmore had not been punished because he had committed a contempt of court but because he would not apologize to Bayard, and declared that the court had no authority to direct one individual to apologize to another. His address was a violent attack on English precedents and the legal profession, with the usual platitudes on the rights of man and the principles of the Revolution. Mr. Rodney's speech was more dignified and it is apparent that his task was uncongenial. For the defense the speeches of Dallas and Ingersoll were brilliant and exhaustive, replete with reported precedents as well as manuscript records, which their industry had discovered and which throw much light on the early practice of the courts in attachments. That any doubt could be felt as to the issue of this trial is a matter for wonder, and that thirteen out of twenty-four senators voted for conviction is a lasting disgrace to their names. Fortunately, the prosecutors failed by three votes to obtain a two-thirds vote. and the judges were declared acquitted.

One incident of the trial deserves mention. Judge Brackenridge was not on the bench when the motion for the

[37] See printed report of the Judges' Trial (1805).

attachment of Passmore was made and at the time of the argument was returning from a special court in Northumberland County, but was present when sentence was passed. He was not included in the impeachment, but at once wrote to the House stating that he concurred in the opinion of his brethren, and while not courting prosecution, could see no distinction in his case and asked to be included in the impeachment. The House sent up an address to Governor McKean for his removal, which was refused, and when a committee urged that the term in the constitution "may remove" meant "must remove," he replied that he would have them know that "may" sometimes meant "won't."

This offer to stand impeachment with his colleagues was the most courageous act in the public career of the most eccentric genius that ever sat on our supreme bench, about whom a few words may be interesting. Hugh Henry Brackenridge, born in Scotland, of poor parents, was brought as a child to this country. By teaching school he saved enough to attend Princeton, where he became a tutor, studied divinity and served as a chaplain in the Revolutionary army. In 1778 he commenced the study of law with Samuel Chase, afterwards a justice of the Supreme Court of the United States, and, locating at Pittsburg, soon became a leader of the western bar. During the whiskey insurrection Brackenridge's conduct was not free from suspicion. His opinions were opposed to the excise tax and if he did not join the insurgents he did not take a very firm stand against them. He was marked for arrest by Hamilton, but was saved, it is said, by James Ross, the rival leader of the bar and afterwards United States Senator. At the bar he was noted for his shrewdness, wit and eloquence, and was a writer of considerable talent; "Modern Chivalry," a satirical work from his pen, has gone through several editions. On the bench he did not display the same power as at the bar; his opinions were racy, but not profound and fail to do justice to his real learning. He was an untiring student, but his dislike of convention led him at times into a show of flippancy. The enmity between Judges Yeates and Brack-

enridge was a curious incident of the times. It probably dated from the time of the whiskey insurrection when Yeates served as one of the commissioners to deal with the insurgents. No two men were ever more dissimilar in appearance, habits and opinions; Judge Yeates a tall, florid, portly man, rich, aristocratic and fond of society, Brackenridge dark and sallow, of moderate means, a bookworm and recluse, and absolutely indifferent to his appearance. An examination of the reports will show that the associates rarely agreed, and the position of Chief Justice Tilghman must have been peculiarly difficult. Indeed the eccentricities of Brackenridge, if half the traditions are true, would almost amount to insanity, but it is difficult at this day to say whether his want of judicial decorum arose from this cause or from his utter contempt for social conventions. Among the odd stories told of him is one narrated by David Paul Brown:[88]

"During the time, as has been said, the circuits existed, a friend of the judge, riding in his carriage in the western part of the state, while a prodigious storm of wind and rain prevailed, saw a figure approaching, which resembled, what might be conceived of Don Quixote, in one of his wildest moods, a man, with nothing on but his hat and boots, mounted upon a tall, raw-boned Rosenant, and riding deliberately through the tempest. On nearer approach he discovered it to be Judge Breckenridge, and upon inquiring what was the cause of the strange phenomenon, Breckenridge informed him, that seeing the storm coming on, he had stripped himself and put the clothes under the saddle; 'because,' said he, 'though I am a judge, I have but one suit, and the storm, you know, would spoil the clothes; but it couldn't spoil me.'"

The interminable criticisms of and complaints against the judiciary during the early nineteenth century were in a large measure due to the fact that judges held office for life. The same processes were to be seen at work in the other states, culminating in the abolition of life tenure and the substitution of a term of office varying, under the different constitutions, from one to twenty years. In Pennsylvania this result was accomplished by one of the constitutional amendments adopted in 1838, by which the terms of

[88] The Forum, vol. i, 404.

the supreme court judges were fixed at fifteen years and those of the common pleas judges at ten. This change was not adopted without vigorous opposition on the part of the leaders of the bar[39] and is a subject upon which opinions differ to-day. We may suspect that, however the political leaders who advocated the change may have declaimed against the dangers of caste prejudice, favoritism and despotic conduct, they were looking at the offices with envious eyes and plotting to divert the meagre salaries to partisan purposes. This was the period when American political life, in its outward aspects at least, reached its lowest depths of degradation, and that the judiciary should suffer thereby was inevitable. Americans had yet to learn that democracy was not synonymous with vulgarity and provincialism, and that the American Revolution had not severed us from the traditions of our race, or the French Revolution emancipated us from the rules of social decorum. The American "Sans Culotte" was an unlovely type, an iconoclast and a bitter partisan, and that he should have done his best to add the judiciary to the spoils system is not the least count in his indictment.

The citation of English decisions in the opinions of the courts greatly exasperated the radical element. What were these precedents but the rags of despotism, who were the judges that had rendered them but tyrants, sycophants, oppressors of the people and enemies of liberty! There was danger that our courts might be contaminated by the source from which they drew their inspiration, so an act was passed March 19, 1810,[40] which provided that it should not be lawful to read or quote in any court of this commonwealth, any British precedent or adjudication which had been given or made subsequent to the fourth of July, 1776, except those relating to maritime law or the law of nations. Upon this act Judge Brackenridge wittily remarked:

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[39] Debates of Pa. Constitutional Convention of 1837, vol. x, 148 *et seq.*

[40] P. L. 156.

"Were it not that I should be unwilling to enter into a contest with the legislature, where public opinion, or prejudice is on their side, I might be disposed to question the constitutionality of this act. It would seem to be abridging the right of the judiciary, to hear all reason on a question before them.

——————What is't to us
Though it were said by Trismegistus?

"But if we are to hear the saying of a lord, years, or centuries ago; and before the 4th July, 1776, why not what another lord has said since, to explain or contradict the adjudication? The fact is, early decisions were, many of them narrow; and why drink out of the neck of a gourd, rather than out of an open goblet; more especially if the fountain was muddy, out of which the gourd was filled; the stream of law in that country, now runs more clear in particular cases than centuries ago; and it will always remain so, the law being an improvable science."

This act was repealed in 1836.[41]

It may be said, however, for those who railed against the judges, that many of the lay associates set anything but a good example of judicial dignity, and quarreled even to the point of coming to blows and dragging each other from the bench. The law judges, who rode the circuits, manfully attempted to preserve in the log court houses of remote counties the dignity of Westminster Hall, and added to their unpopularity with the uncouth inhabitants by instructing them in manners as well as in the law. In his "Recollections of the West,"[42] Judge Brackenridge's son, himself also a judge, gives an amusing picture of the first court held in Butler county. The court house was a log cabin into which bench, bar and the entire village population were crowded. The audience hung from the rafters like bats, and when these were cleared away by the sheriff, a big Irishman objected to being removed. The Court sentenced him to an hour's imprisonment for contempt, whereupon the sheriff was greatly puzzled as to what he should do with his prisoner, as there was no jail. It was finally decided that he should be incarcerated in a pig pen, emptied to prepare a feast for the court, but the prisoner was too much for his captors and made his escape into the brush.

[41] Brackenridge's Miscellany, 525. Act of March 29, 1836, P. L., 224.
[42] Recollections of the West. H. M. Brackenridge. See extract in Haz. Pa. Reg., vol. xiv, 172.

During most of this period the supreme court was presided over by chief justices of reputation equal to almost any, and superior to most of those who have sat in American state courts, Tilghman and Gibson. William Tilghman[48] came of a family of distinguished lawyers, his father being secretary of the Provincial Land Office, and his maternal grandfather, Tench Francis, the bar-leader of the provincial court of his time. His first judicial appointment was by President Adams on March 3, 1801, to the circuit court of the United States for this circuit; hence he was one of the so-called "midnight judges," commissioned a few hours before Jefferson took office, and legislated out of office in the following year. In 1806 he was appointed chief justice by Governor McKean on the recommendation of his cousin, Edward Tilghman, who declined the office. His appointment gave offence to some of the minor Democrats, but the Governor, although a leading member of that party, having once made up his mind on the subject, was not to be moved.

"A committee, consisting of Duane, Lieper, and others, were appointed by a town meeting to wait upon him, to inform him that the democracy of Philadelphia were utterly opposed to the nomination of William Tilghman as chief justice of Pennsylvania. The committee were introduced into the executive apartments, and the governor received them in his civil but reserved and aristocratic manner, treating them simply as his constitutents; when, however, they announced themselves as the representatives from the democratic party —the sovereign people—he bowed most profoundly, and inquired of them what the great democracy of Philadelphia required of him. They proceeded, and stated the purposes of their delegation, and in pretty plain terms gave him to understand that the appointment of Mr. Tilghman would never meet the approval of the democratic party. 'Indeed,' said the governor, 'inform your constitutents that I bow with submission to the will of the great democracy of Philadelphia; but by G—d, William Tilghman *shall be* chief justice of Pennsylvania.'"

The confidence of the Governor was justified by the long and distinguished career of his appointee, whose judicial decisions are marked by a comprehensive knowledge of the common law and an unusual clearness of diction. "Other Judges," says Binney, "may have had more learning under

[48] See Binney's Eulogy, 16 S. & R., 444; The Forum, vol. i, 343.

their immediate command,—none have had their learning under better discipline, or in a condition more effective for the duty upon which it was employed."

An adequate life of his great successor, John Bannister Gibson, has still to be written.[44] Appointed to the common pleas in 1812 and to the supreme court in 1816, of which he became chief justice in 1827, his reputation increased with years, and common consent assigns to him the first place in our judicial history. "Abroad," said Chief Justice Black, "he has for many years been thought the great glory of his native state." Chief Justice Gibson has been credited with an abhorrence of the petty and prosaic details and drudgery of the law, qualities that would have militated against a successful career as an advocate, but given a problem, no judge could grasp it more firmly or dispose of it more readily, and he was master of a style which in vigor of expression and condensation of thought is unrivalled, "When he brought the lens of his mind to a focus, its power was resistless." For one act in his career he was subjected to some criticism. The constitutional amendments of 1838 substituted a term of fifteen years for life appointment and the commissions of the judges on the bench were to expire at intervals of three years. At the suggestion of his colleagues, the chief justice resigned in 1838, and was immediately reappointed, and thus, instead of holding to the shortest term, enjoyed the longest. The necessity for this action was no doubt humiliating to him, who could hardly have resumed practice at that period of his life, but on the other hand his loss to the state would, at that time of transition, have been irreparable, and when his term expired in 1851, he was re-elected almost without opposition.

If space permitted, it would be proper to say something of the bar at this time, which was particularly distinguished, and made the name of a "Philadelphia lawyer" a by-word for legal astuteness.

During the greater part of this period Philadelphia was

[44] See Eulogies in Appendix to 19 Pa. State Reports, and W. A. Porter's Essay.

the leading city of the nation, both in population and wealth, and the achievements of the local bar attracted national attention. Such leaders as William Lewis, Jared Ingersoll, William Rawle, William Bradford, Alexander James Dallas and Horace Binney, both in private practice and public office, exhibited talents that were admired and esteemed by their contemporaries and served as models for their students and successors. Indeed, so much has been said about the good old times, that we are often in danger of minimizing professional progress, which, in the nineteenth century, has been in the nature of a forced march to keep pace with the flying wheels of Father Time's steam and electric chariots. If we have lost anything, it is the pride of a small and exclusive professional body and the sense of responsibility that accompanies such pride, but we have gained in breadth of view, in depth of sympathy, and, perhaps, in greater freedom from prejudice.

William H. Loyd, Jr.

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NOTES.

COMPENSATION TO THE ABUTTER FOR A NEW USE MADE OF THE HIGHWAY.

In deciding whether an abutting property owner is entitled to compensation when a new use is made of the street or highway by the public, or under public authority, it is repeatedly stated that it is immaterial whether the fee is in the abutter or the public.[1] Under the modern decisions the extent of the rights of each in either case is about the same. Yet it is cer-

[1] Dillon on Municipal Corporations (4th Ed.), Sec. 704.

tainly true that the character of the rights in each case is different and requires the application of entirely different principles.

When the fee is in the public, the only particular property which the abutter owns, in addition to that which he enjoys as a member of the public, is the easement of access, light and air, appurtenant to his particular lot. It is an incorporeal right. Whether any new use of the street or highway entitles him to compensation, depends entirely upon whether this easement is obstructed. An elevated structure does impair this easement,[2] and the running of steam cars on the surface does not, *per se*.[3] Horse and electric cars require no compensation to the owner, neither do electric light or trolley poles, and therefore telephone and telegraph poles should not.[4] Obviously, a subway or any structure under the surface of the street cannot obstruct this easement. Whether there has been an exclusive and permanent appropriation of any part of the fee; whether the use is consistent with the purpose of the highway; whether it is in the country or the city; whether it is to supply a service to the locality or only to a distant place; are questions which are not involved.

But if the abutter owns the fee, his rights are corporeal, and the right of access, light and air belong to him as part of his enjoyment of that fee. The public has only an easement. Any exclusive appropriation of the soil is a trespass, unless it is within or incident to that easement. A use which improves the street as a place for travel, as, for example, facilities for lighting, draining, etc., is considered to be incident to the easement. The authorities also agree that the same facility may be used for local domestic or municipal needs without compensation to the abutter, on the ground that the accruing benefits fully compensate him. And it is only necessary that the facility be available for a street use, though not actually used at the time.[5] If the construction is to supply distant places only, it is an additional servitude, because there is no local benefit.[6]

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[2] *Story* v. *N. Y. Elevated Ry.*, 90 N. Y., 122.

[3] *Williams* v. *City Electric Street Ry. Co.*, 41 Fed., 556; *Reining* v. *N. Y., Lack. & W. R. R.*, 128 N. Y., 157 (1891); *Fobes* v. *R. R. Co.*, 121 N. Y., 505 (1890).

[4] *Gay* v. *Mutual Union Tel. Co.*, 12 Mo. Ap., 485; *Board of Trade Tel. Co.* v. *Burnet*, 107 Ill., 507 (1883).

[5] *Wilcher* v. *Holland Water Co.*, 66 Hun, 619 (1893), 142 N. Y., 626 (1894).

[6] Sterling's Appeal, 111 Pa., 35 (1885); *Van Brunt* v. *Town of Flatbush*, 128 N. Y., 50 (1891); *Palmer* v. *Larchmont Electric Co.*, 158 N. Y., 231 (1899).

But even if a construction does supply a local domestic or municipal purpose, it is an additional servitude, if it does not at the same time supply a street use, but instead is independent of such a use. A telephone is said to be within that rule; *Osborne* v. *The Auburn Telephone Co.*, 109 N. Y. 393, 1907. But a telephone, in supplying a ready means for notifying the proper authorities of defects, etc., does make possible a speedier repair when needed; and therefore a contrary decision might have been reached. The same jurisdiction has consistently held that street passenger railways are not incident or within the public easement, whether steam,[7] electric,[8] or horse.[9] The change of motive power is not material, or automobiles would raise the question. The weight of authority holds that such do facilitate travel along the highway, and therefore are incident and within the public easement,[10] unless the particular kind of railway is inconsistent with the purpose of the highway for local traffic. Accordingly a steam railroad, because of the speed and infrequency of the stops, is held to be an additional burden.[11] But these jurisdictions are in accord with the principal case as to telephones.[12] Some jurisdictions have gone further and held that the public easement not only includes all modes of transportation, but also all modes of inter-communication; and therefore allow no compensation for a telephone.[13]

The correctness of the above decisions depends upon whether the extent of the public easement is determined by the extent of the terms of the original grant, or by reasoning as to what it should be. If the right of the public was obtained under eminent domain proceedings, the statute should control the extent of the right acquired; and since it is taken in derogation of private right, it must be construed strictly.[14] A use for a different purpose imposes an additional burden.[15] However, if the right was dedicated to the public by the owner, there is no necessary reason for a strict construction.[16] It was a willing act.

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[7] *Williams* v. *N. Y. Central R. R.*, 16 N. Y., 97 (1857).

[8] *Peck* v. *Schenectady Ry. Co.*, 170 N. Y., 298 (1902); *Paige* v. *Schenectady Ry. Co.*, 178 N. Y., 102 (1904).

[9] *Craig* v. *Rochester City R. R. Co.*, 39 N. Y., 404 (1868).

[10] *Halsey* v. *Rapid Transit Street Ry. Co.*, 47 N. J. Eq. 380 (1890).

[11] *Taggart* v. *Newport Street Ry. Co.*, 19 Atl. (R. I.), 326 (1890).

[12] *Nicoll* v. *N. Y. & N. J. Tel. Co.*, 42 Atl. (N. J.), 583 (1894); *Postal Tel. Co.* v. *Eaton*, 170 Ill., 513 (1897).

[13] *Pierce* v. *Drew*, 126 Mass., 75 (1883).

[14] Lance's Appeal, 55 Pa., 16 (1867).

[15] *State* v. *Laverack*, 34 N. J. L., 201 (1870).

The same applies to a limited extent to an easement obtained by prescription. It is certainly desirable that the public easement should be as broad as possible. Streets and highways are the natural places for the constructions required by the various public utilities. Private rights are least interfered with, because the streets are already surrendered to public uses. For that reason, damages are generally nominal, when an additional servitude is held to be imposed.[17] Condemnation proceedings are expensive and seem to be unnecessary. Yet, a decision which upholds the rights of private property, even for purely technical reasons, is not to be condemned. The remedy lies with the legislature. Statutes should provide for the taking of the fee, whenever land is taken for street or highway.

The Constitutionality of a State Appropriation to a Private Association.

The decision of the supreme court of Michigan in the case of *Michigan Corn Improvement Association* v. *Auditor General*, 113 N. W. 582, presents in a new form the question of the constitutional limitation on legislatures in the matter of granting bounties to associations representing particular industries. The statute to be decided upon was one appropriating five hundred dollars a year, for the years of 1907 and 1908, "for the use of the Michigan Corn Improvement Association in the prosecution of its work of creating a deeper interest in and a better knowledge of the culture and improvement of corn;" the sums to be expended "under the direction of the board of directors of said association in such way as in its judgment will most effectually attain the ends sought." The beneficiary is a voluntary, unincorporated association, whose membership is limited to "persons actively interested in the improvement of corn and residents of the State of Michigan," and whose objects are: (1) "To stimulate effort to improve the quality of the corn crop and increase the yield of both grain and fodder; (2) to develop better methods of culture and disseminate the knowledge of the same; (3) by meetings and discussions to arouse a deeper interest and develop a more thorough unity of effort in corn production; and (4) to establish ideals for both ear and plant for the different varieties and breeds." At its annual meeting is held a corn

[17] Dillon on Municipal Corporations (4th Ed.), Sec. 722.
[18] *Eels* v. *A. T. & T. Co.*, 143 N. Y., 133 (1894).

exhibit, at which prizes are offered, to its members only, for the best exhibit of corn.

The court held the act unconstitutional, as discriminating in favor of one industry; "the only persons," it said, "who will be directly benefited by the proposed appropriation are those 'actively interested in the improvement of corn.'" This is practically all that the court says of its own motion, the case being ruled directly, in its judgment, by the leading decision in the state on the subject of bounties, the *People* v. *Salem*, 20 Michigan, 452 (1870). In the latter case the court, in a vigorous opinion delivered by Judge Cooley, refused to recognize the constitutionality of an act authorizing certain counties to levy a tax to aid in the construction of a railroad. In the course of the opinion, Judge Cooley announced the principle that the state has no power to grant bounties, such as "to furnish the capital to set private parties up in any kind of business, or to subsidize their business after they have entered upon it." It was after quoting this decision that the present court decided the corn case.

The principle has long been recognized that neither taxation nor appropriation by the legislature is valid if made for any save a directly public purpose. "Because," says the United States Supreme Court,[1] "such a tax would, if collected, be the transfer of the property of individuals to aid in the projects of gain and profit of others," and hence a taking of property without just compensation. But the determination in each particular instance of the true question as to what is and what is not a "public purpose," is ordinarily one of legislative discretion, unhampered by judicial interference. "The tax must be considered valid, unless it is for a purpose in which the community taxed has palpably no interest; where it is apparent that a burden is imposed for the benefit of others, and where it would be so pronounced at first blush."[2] Hence the tendency of the courts is to sustain the legislation whenever possible, and we have a large number of reported cases in which they have refused to hold the statute invalid, because it did not appear to be a gross abuse of discretion.

Thus the general rule as to legislation in aid of railroads is different from that laid down in Michigan.[3] While acts have

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[1] *Loan Association* v. *Topeka*, 20 Wallace, 655 (1874).

[2] *Sharpless* v. *Mayor of Philadelphia*, 21 Pa., 168 (1853).

[3] *Taylor* v. *Ypsilanti*, U. S., 60 (1881); Cooley on Constitutional Limitations, 676 note; *Stockton R. R.* v. *Stockton*, 41 Cal., 147 (1871).

been held valid which granted bounties to public grist-mills[4] (though these are now mostly obsolete[5]); to volunteers in time of war;[6] and to various local industries, such as the culture of silk;[7] wherever, in short, any direct public benefit could be discerned as accruing from the legislation. On the other hand, in the absence of such direct benefit, however great may be the incidental advantage to the public, the statute is ordinarily held unconstitutional.[8] But it is to be noted that these cases all deal with legislation whose avowed object is to assist some private *commercial* enterprise, and as such the Michigan court seems to have viewed the act in question. Should it affect the decision in any way, if it be considered that the purpose of the association which was being benefited was at least as much educational as commercial? That it was "to disseminate knowledge" and "to establish ideals," as well as "to stimulate effort?"

Bounties to agricultural societies have been held valid,[9] where they have been incorporated, and one of the terms of the charter is the holding of an annual fair, the theory being that it is of great benefit to the entire commonwealth that progressive interest in farming be stimulated. Moreover, this is in no sense a single industry, but rather a phase of national life. Educational institutions, also, are the lawful recipients of state funds, but only where they are under the control of the state or municipality.[10] Whenever they partake of the nature of private foundations, they come within the constitutional prohibition. Thus, in *Curtis* v. *Whipple*, an act authorizing a bonus to aid the Jefferson Liberal Institute was declared void because, though a school of learning, it was a private enterprise; the court distinguishing direct public benefits, such as might accrue were the school under direct municipal control and subject to public requirements as to who should and who should not be admitted, from those incidentally due to the existence of an institution of learning in the community. And in *Jenkins* v. *Anderson*, the aid was

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[4] *Burlington Township* v. *Beasley*, 94 U. S., 310 (1876).

[5] Gray—Limitations of the Taxing Power, 135, 191 (1906).

[6] *Booth* v. *Woodbury*, 32 Com., 118 (1864); *Brodhead* v. *Milwaukee*, 19 Wis., 624 (1865).

[7] *Stockton R. R.* v. *Stockton*, 41 Cal., 147 (1871).

[8] *Deering* v. *Peterson*, 77 N. W. (Minn.), 568 (1898); *Michigan Sugar Co.* v. *Auditor General*, 124 Mich., 674 (1900); *Loan Association* v. *Topeka*, *supra*.

[9] *Hixon* v. *Eagle River*, 91 Wis., 649.

[10] *Curtis* v. *Whipple*, 24 Wis., 350 (1869); *Jenkins* v. *Anderson*, 103 Mass., 74.

denied to a school established by funds provided by the will of a citizen, because the governing board consisted of trustees appointed by the will.

Thus the distinction is one in kind, and not in degree; the public benefit must be clear, direct and unmistakable; no amount of incidental advantage to the community will avail. It would seem, therefore, that even viewing this as an association largely educational in its nature, and approaching the criticism of the statute on general principles of common law, thus laying aside the anomalous ruling of *The People* v. *Salem*, its constitutionality could not be sustained. It is most obviously special legislation in favor of a limited group of individuals, and although the group is capable of enlargement, the object to be attained is not. "The right to tax depends on the ultimate use, purpose and object for which the fund is raised, and not on the nature or character of the person or corporation whose intermediate agency is to be used in applying it." [11]

Doctrine of Price *v.* Neal; Effect of Indorsement by Holder.

The doctrine of *Price* v. *Neal* [1] to the effect that the drawee of a bill of exchange or check of which the drawer's signature is forged cannot recover the money paid by him to the holder is well established. To this doctrine, however, there are exceptions, which unfortunately stand on more precarious footing, and are more uncertain in their applications. In general, these exceptions arise out of negligence or bad faith on the part of the holder. Thus, where by custom a duty of precaution is thrown upon a collecting bank which it neglects,[2] or where the circumstances are such as to put the holder on suspicion and he fails to exercise due diligence,[3] the case is taken outside the general rule. It has been held that a further exception exists where the instrument is endorsed by the holder, on the ground that the signature amounts to a guaranty of genuineness.

The recent case of *Williamsburgh Trust Co.* v. *Tum Suden*, 120 N. Y. App. Div. 518, sanctions this view. The idea that the

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[11] *Sharpless* v. *Mayor of Philadelphia*, 21 Pa., 168 (1853).

[1] 3 Burr, 1354.

[2] *Ellis* v. *Ohio Ins. Co.*, 4 Ohio, 628.

[3] *Nat. Bank of N. America* v. *Bangs*, 106 Mass., 441; *Rouvant* v. *San Antonio Nat. Bank*, 63 Tex., 612.

signature of the holder is a warranty of the genuineness of the note seems to arise from a misunderstanding of the purpose of the signature. Manifestly it is not an indorsement in any proper sense, for that term applies only to an instrument which has not yet come to maturity.[4] Nor can it be a guaranty, for to hold so is to disregard the common understanding of the effect of the signature, which is that it is a receipt.[5] "One of the best receipts is the placing on the back of the bill the name of the person who has received payment of it."[6] An illustration will serve to refute the idea that the signature is anything but a receipt; surely it would not be contended that a drawee who had paid out funds to a greater amount than the drawee's account, could recover the money on the ground that the payee's signature amounted to a guaranty that the drawer was in funds. Moreover, if the signature be an indorsement, then because by custom the holder places his signature upon the check, the doctrine of *Price* v. *Neal* is virtually "excepted out of existence."

While the view that the signature is a guaranty is not without judicial sanction,[7] it is submitted that almost without exception the cases usually cited by text-writers do not really substantiate this proposition. There are generally in these cases either negligence on the part of the holder at the time of taking the instrument,[8] or knowledge of suspicious facts at the time of receiving the money.[9] Moreover, if the opinions in these cases are read as a whole they will be found not to support the doctrine that the signature *per se* enables the drawee to recover, but merely that the signature "is a fact that tends to show that the appellee (the drawee) was guilty of no negligence in paying the check,"[10] and thus is important only "where the indorsement is made under circumstances which establish or impute negligence to the indorser."[11]

It is submitted further that the force of the recent case is

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[4] Daniel on Negot. Ins., (5th Ed.), 666.

[5] Story on Prom. Notes, (7th Ed.), 526, note 5; Chitty on Bills (1st Ed.), 157 (1799).

[6] *Keene* v. *Beard*, 8 C. B. N. S. 372, 382.

[7] *First Nat. Bank* v. *First Nat. Bank*, 4 Ind. App., 355.

[8] *Nat. Bank* v. *Bangs* (*supra*); *Danvers* v. *Salem Bank*, 151 Mass., 280, at 283.

[9] *Rouvant* v. *Bank* (*supra*).

[10] *First Nat. Bank of Quincy* v. *Ricker*, 71 Ill., 439; *Nat. Bank* v. *Bangs* (*supra*), at 445, intimating that had the holder been without fault, recovery would have been refused.

[11] *People's Nat. Bank* v. *Franklin Bank*, 88 Tenn., 299, at 306.

weakened by the fact that the court seems in part to have rested its decision on the fact that the holder was also the payee. Even this ground, however, seems questionable, for while in many instances the equity of the payee-holder may be inferior to that of the holder who is not a payee, this cannot be stated as an inflexible legal principle. Thus, while it is true that where the check is negotiated to the payee by a stranger, there is something suspicious in the very nature of the transaction,[12] there would be nothing to put the payee on guard where the check was presented by an agent of the drawer and paid to the drawer's use.

The case is also of interest to the student of the doctrine of *Price* v. *Neal* in that it suggests that where the holder has customarily cashed checks for the drawer, he is held to a knowledge of the drawer's signature and cannot shift that duty to the drawee.

The Liability of a Charity for the Negligence of its Servants.

In the case of *Toseland* v. *Guardians of the Poor of the West Ham Union*,[1] the question of the liability of a charity for the negligence of its servants came before the Court of King's Bench on appeal. The facts were as follows: The plaintiff, an inmate of a workhouse and recipient of poor law relief, was directed to assist at the installation of electric lights in the infirmary under the management of one Byers, the resident electrician. By the English poor law paupers who refused to work when assigned to a job could be brought before a magistrate and committed to jail. At the direction of Byers the plaintiff mounted a scaffold which, being insecurely constructed through the negligence of the electrician, collapsed, injuring the plaintiff, who then sued the guardians of the local union for damages. On appeal, a verdict in favor of the plaintiff was reversed on the ground that the plaintiff in entering the workhouse as an inmate assumed the risk of negligence on the part of the guardians and their employees, or, at least, that the union owed no duty of care to him and hence he could not recover.

Though the rule that one who takes advantage of the benefits offered by a public or private charity cannot recover against it

[12] *Nat. Bank* v. *Bangs* (*supra*), 445.

[1] L. R. (1907), 1 K. B., 920.

for the negligence of its servants (at least if the latter were properly selected) is now pretty well settled, the courts are by no means agreed upon the reason for the rule. Three grounds have been assigned: (1) It is against public policy, which desires to foster charitable work in every possible way;[2] (2) the funds of a charity are trust funds and may not be diverted from the purpose for which they were appropriated;[3] (3) a person entering a charity in fact assumes the risk of any injury that he may receive through the negligence of the charity's servants.[4] At least one of these reasons seems to be bad in theory. As has been pointed out,[5] a trustee is individually liable for torts committed in the management of trust property, and though the trust fund is protected from immediate levy, he can reimburse himself therefrom unless individually at fault. Hence the mere fact that the charity is supported wholly or in part through trust funds should not in itself be a ground for non-liability. Either under this or the public policy theory the result would be the same, whether the injury was to an outsider or one who has accepted the benefit of the charity, and so it has been held.[6] Under the "risk theory," however—and this is the theory of the English case—the charity should be liable to an outsider, since he, having entered into no relations with the institution in question, cannot have assumed any risk. This, indeed, seems to be the law in England—the court in the main case carefully distinguishing as inapplicable the case of *Mersey Dock Trustees* v. *Gibbs*,[7] where a dock company performing public functions was held liable for the negligence of its servants resulting in injury to an outsider. A similar result is suggested in *Powers* v. *Massachusetts Homoeopathic Hospital*,[8] though in that case the injury was to a hospital patient, and hence the remark is mere dicta. It is, however, interesting to note that the few cases which have held that a charity was liable for the negligence of

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[2] *Fordyce* v. *Woman's Christian Library Association*, 96 S. W. 155 (Arkansas, 1906); *Hearns* v. *Waterbury Hospital*, 66 Conn., 98.

[3] *Parks* v. *N. W. University*, 12 Ill. App., 512; *McDonald* v. *Massachusetts General Hospital*, 120 Mass., 432.

[4] *Powers* v. *Massachusetts Homeopathic Hospital*, 47 C. C. A., 122; *Cumier* v. *Dartmouth College*, 105 Fed., 886.

[5] *Powers* v. *Hospital*, 47 C. C. A., at 129.

[6] *Noble* v. *Hahnemann Hospital*, 98 N. Y. Suppl., 605; *Fordyce* v. *Woman's Christian Library Assoc.*, 96 S. W., 155.

[7] (1866) L. R. H. L., 93.

[8] 47 C. C. A., 132.

its servants are all, except the English case cited,[9] cases of injuries to persons obtaining the benefit of a private charity.[10] In the case of charitable institutions supported wholly or in part by the state or a municipality, the American courts have uniformly denied liability.[11] It would seem, then, that the principal case is in accord with all the authorities in its facts, but becomes an intensely interesting one by reason of its dicta denying the applicability of the rule to the case of injury to an outsider.

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[9] *Mersey Docks Trustees* v. *Gibbs* (1866) L. R. 1, H. L. 93.

[10] *Donaldson* v. *General Public Hospital*, 30 New Brunswick, 279; *Hewett* v. *Woman's Hospital Assoc.*, 73 N. H., 556. The case of *Glavin* v. *Rhode Island Hospital*, 12 R. I., 411, holding that a hospital is liable for negligence of its doctor, resulting in injury to a patient, has been overruled by statute in Rhode Island. The case could hardly be considered as *contra*, however, since the decision is largely based on the fact that due care was not exercised in the selection of the doctor in question. In accordance with this last proposition there is an abundance of dicta: (*Van Tassel* v. *Manhattan Hospital*, 15 N. Y. Supp., 620; *Wilson* v. *Brooklyn Homeopathic Hospital*, 89 N. Y. Supp., 619).

[11] *Penn* v. *House of Refuge*, 63 Md., 20; *Ford* v. *School District*, 121 Pa., 543; *Maia* v. *State Hospital*, 97 Va., 507; *Peasley* v. *Poor District*, 26 Pa. Co., 428; *Corbett* v. *Industrial School*, 177 N. Y., 16; *White* v. *Hospital*, 138 Ala., 479. (The suit in all these cases was, however, by an employee or a person receiving the benefit of the institution.)

RECENT CASES.

BILLS AND NOTES.

In an action to recover money paid by mistake, it appeared that the defendant had for several months been accustomed to cash checks for one R. Four checks drawn on the plaintiff and apparently signed by R. were cashed by the defendant, who signed his name on the back without any qualification and presented them to the plaintiff for payment. The plaintiff paid the checks, but it was subsequently discovered that they were forgeries, and therefore the plaintiff brought suit to recover the amount paid. Judgment by the lower court for the defendant.

Forged Check Payable to Bearer: When Indorser Liable to Drawer

Held, error, as the defendant should be made to bear the loss.

Williamsburg Trust Co. v. *Tum Suder*, 120 N. Y. App. Div. 518.

See note appearing elsewhere in this issue.

CONSTITUTIONAL LAW.

The legislature of Michigan appropriated five hundred dollars a year to an association to aid it in prosecuting its work of creating a deeper interest in and a better knowledge of the culture and production of corn. The association was a voluntary, unincorporated body, the membership of which was limited to those residents of Michigan actively interested in the improvement of corn. The money was to be expended in such way as the directors deemed most effectual for attaining the object of the association.

Bounties: What Constitutes a Public Purpose

Held, the act was unconstitutional, for the purpose could not be considered a public one.

Michigan Corn Improvement Association v. *Auditor General*, 113 N. W. 582.

See note appearing elsewhere in this issue.

DIVORCE.

A wife sought a divorce on the ground of cruelty. The main acts of cruelty were proved by the direct testimony of complainant, corroborated only in collateral details by other witnesses. Court below granted divorce and husband appealed. *Held*, affirming the judgment, that there is no hard and fast rule preventing the granting of a divorce on complainant's testimony alone, though it is undoubtedly the correct rule that where a divorce is so granted the right thereto must be very clearly established. Supreme Court of Michigan in *Murphy* v. *Murphy*, 113 N. W. 583.

Evidence: Sufficiency

It is generally stated that a divorce will not be granted on the testimony of complainant alone. *Tate* v. *Tate*, 26 N. J. Eq. 55; *Reid* v. *Reid*, 112 Cal. 274.

Indeed, it has been held that where there is a conflict in the uncorroborated evidence of the parties, the testimony of defendant is deemed of greater weight; *Rie* v. *Rie*, 34 Ark. 37. On the other hand, a more liberal view is expressed in *Robins v. Robins*, 100 Mass. 150, where it is said that "the rule . . . . is merely a general rule of practice and not an inflexible rule of law."

EVIDENCE.

In a prosecution which resulted in defendant's conviction for manslaughter, the defendant offered evidence tending to show that his character as to peaceableness and quietness was good, this evidence to be based on the personal knowledge and observation of the witness. *Held*, that while the community reputation as to particular traits is admissible upon the question of character, the personal knowledge and belief of the witness must be excluded; *People* v. *Van Gaasbeek*, 189 N. Y. 408. Originally, the personal opinion of the witness was admitted; *Wigmore on Evidence*, Sec. 1981. In course of time the rule was conceived to be that evidence of general reputation only was admissible, and this has been generally followed; *Reg.* v. *Rowton*, Leigh and Cave 520. The original view is still adhered to in a few jurisdictions on the ground that there is no reason why general repute is any better or more satisfactory evidence of disposition than the testimony of one who knows what the disposition in question is from his own personal observation; *State* v. *Lee*, 22 Minn. 407. The evidence gained by experience is admittedly worth more than

Character: Whether Personal Opinion of the Witness is Admissible

EVIDENCE (Continued).

that from the reputation a man bears; *Wigmore on Evidence*, Sec. 1986. The New York court says if evidence of witness's personal opinion is admitted, then the incidents on which he bases his opinion must be admitted, and this would lead to collateral issues and admit evidence which is practically irrebuttable by the commonwealth. The reasoning of the court is answered by the practice in those states where the original doctrine is adhered to; but since what the witness does give is generally his personal view and it is not objected to, the question of the admissibility of this opinion evidence arises seldom and is practically unimportant. Note XXV to *Stephens' Digest of Evidence.*

MUNICIPAL CORPORATIONS.

Action was brought for injuries sustained by falling into a hole in one of the city streets. A demurrer was sustained on the ground that no notice in writing within thirty days of the injury complained of was given as required by section 39, art. 3, c. 13, Comp. St. 1907. The plaintiff sought to avoid the effect of the statute by pleading that she was unconscious during the prescribed time and was therefore excused from giving the required notice. This plea was held insufficient; *Ellis* v. *City of Kearney*, 113 N. W. 803, Supreme Court of Nebraska. While this decision accords with the general line of cases, many states have avoided the evident injustice of the statute in such cases as this by providing that if any person receiving injuries from defects in a highway is unavoidably prevented from serving the required notice within the time prescribed by the statute, the supreme court may allow such claim to be filed if manifest injustice would otherwise be done; *Chadborne* v. *Town of Exeter*, 60 N. H. 190.

Actions for Negligence: Notice of Injury

NEGLIGENCE.

The plaintiff, an inmate of a workhouse and recipient of poor law relief, was directed to assist the resident electrician in the installation of electric lights. Refusal to obey would, under the English law, have rendered the plaintiff liable to imprisonment. A scaffolding on which the plaintiff had mounted collapsed, thereby injuring the plaintiff. The accident being due to the negligence

Liability of Charity for Acts of Servants

NEGLIGENCE (Continued).

of the electrician in not having the scaffolding securely constructed, the plaintiff brought suit against the Guardians of the Poor, whose servant the electrician was.

Held, there could be no recovery.

Tozeland v. *Guardians of the Poor*, L. R. (1907) 1 K. B. 920.

See note appearing elsewhere in this issue.

Duty to Trespasser: Opening near Highway: Province of Court and Jury

The defendant maintained a cellarway to his store at the corner of two streets. On one side this was unguarded. The distance from the sidewalk to this unguarded side was two feet, the intervening space being level with the sidewalk. The plaintiff hurrying to the railroad station on a dark evening turned the corner sharply and fell into the cellarway. The lower court left the case to the jury, which found a verdict for the plaintiff. *Held*, error; *Collins* v. *Decker*, 120 N. Y. App. Div. 645.

The attitude of the court is shown by the following extracts from the opinion: "There is no difference in principle whether the stairway be two or twenty feet from the sidewalk. The act of the plaintiff in leaving the sidewalk may have been natural and excusable. But he did not take the time or trouble to properly inform himself of the exact boundaries of the streets as indicated by the sidewalk." P. 648. "I am convinced that the test of liability is whether the excavation adjoins the highway or is in such close proximity thereto that a person *while* on the highway stepping or stumbling, or making a misstep falls into the excavation, but that such liability does not exist where the traveller deviates for ever so short a distance and becomes a trespasser before he falls."

There seems a tendency in some courts to punish even innocent though technical trespassers by debarring them from recovering for negligence. In a Pennsylvania decision, Strong, *J.*, used the following expression: "There is as perfect a duty to guard against accidental injury to a night intruder into one's bed chamber as there is to look out for trespassers upon a railroad;" *Railroad* v. *Hummel*, 44 Pa. 375. It is hard to find a reasonable ground for such a view. The preferable rule would seem to make liability depend upon the probability of trespassers coming upon the property and receiving injuries; Am. and Eng. Encyc., Vol. 21, p. 472; Shearman and Redfield, Negligence, 5th Ed., Vol. 1, § 97; *Sanders* v. *Riester*, 1 Dak. 151. A man will not ordinarily be bound to anticipate wilful tres-

NEGLIGENCE (Continued).

passers. Sometimes he ought and is held to be bound to anticipate innocent trespassers. The liability imposed on one who causes injury to trespassing infants by allowing attractive dangers to be within their reach, though on his own property, is an instance of this. If this be the correct view a court should not take a case from the jury unless no reasonable differences of opinion could be entertained as to the probability of trespass and injury.

PRINCIPAL AND AGENT.

Unauthorized Sale by Stockholder: Measure of Damages

When, after notice of an unauthorized sale of a contract for the future delivery of cotton by his broker, the customer determines upon his line of conduct by immediately notifying his broker that he will hold him legally responsible, he cannot measure his damages by the highest market price obtained by similar contracts within a period of two weeks after the unauthorized sale; this because he cannot speculate at the expense of his broker, but is only entitled to the highest market price attained within the reasonable time necessary to enable him to determine upon his line of action; *Hurt* v. *Miller*, 120 N. Y. App. Div. 833, McLaughlin and Clarke, *JJ.*, dissenting in part.

In actions for the conversion of stocks, etc., the weight of authority seems to support the rule allowing the recovery of the highest value of such stock from the time of the conversion up to a reasonable time after knowledge of such conversion. Cases are not lacking, however, which hold the measure of damages to be the value of the stock at the time of the conversion; *Freeman* v. *Harwood*, 49 Me. 195. Some of the states, on the other hand, have adhered to the original rule of highest intermediate value between the conversion and the trial; *Learoch* v. *Parson*, 208 Pa. 602 (1904), Thompson, *J.* "While it is true that in the conversion of ordinary chattels the measure of damages is the value at the time of the conversion, yet, in view of the shifting character of the price of stock in our stock exchanges such a rule would be manifestly inadequate. It has, therefore, been held that stocks are an exception to the rule in question and the highest price in the market is consequently made the measure of damages." Some states have enacted statutes allowing the recovery of the highest market value of the property at any time between the conversion and the trial; Cal. Civil Code, par. 3336. But under all such statutes the action must be prosecuted with reasonable diligence.

SALES.

On Approval or Trial: Acts Constituting Election

Defendant sold a traction engine to the plaintiff in consideration of $400 and an old horse power. Ten days' trial was allowed. After testing the engine on six or seven different days the plaintiff sent word to the defendant of his absolute determination not to accept. During the rest of that day and half the next he used the engine in order to finish a job of threshing on which he was then engaged. When he demanded from the defendant the old horse power of which the defendant had obtained possession, the latter, denying the plaintiff's right to rescind, refused to return it. In an action of replevin to recover the old horse power the jury found for the plaintiff, but in answer to two questions from the court, found: (1) That plaintiff had absolutely determined to reject the machine; (2) that after so determining he proceeded to use it for the purpose of finishing the threshing job on which he was engaged. The court entered judgment for the defendant. *Held*, judgment affirmed, for the use of the machine after determination to reject constituted acceptance; *Fox* v. *Wilkinson*, 113 *No. West*, 669 (Wis.).

Acceptance, since it depends on intention, is a question of fact for the jury unless the evidence is such that reasonable men could not differ as to the conclusion to be drawn therefrom. Where goods are delivered on trial use of them in excess of what is necessary for trial, either with respect to time or amount, will usually be held conclusive evidence of exceptance in the absence of evidence to the contrary; Benjamin on Sales, 5th Ed., p. 1013; *Palmer* v. *Baufield*, 86 Wis. 441. But it is not necessarily so. The use of a horse beyond the time agreed on for trial was held not to be conclusive so as to take the case from the jury; *Kahn* v. *Klabund*, 50 Wis. 235. Where there is a question whether the use was necessary for trial or not, the case should go to the jury; *Okell* v. *Smith*, 2 E. C. L. 49. The right of the buyer to use the goods after showing a determination to reject is clearly a distinct question from the effect of such unnecessary use in evidence of intent to accept. If there is evidence clearly negativing such intent, then in spite of such unnecessary use the question should be submitted to the jury; *Schwarz* v. *Church*, 60 Minn. 183. The principal case therefore seems extreme.

SALES (Continued).

Vendor's Mistake Known to Vendee

Purchaser agreed to take certain "Bassein Rice" according to sample, and sold the invoice at an advance. After the purchaser found that the sample was not "Bassein" rice, but "Java" rice, a much more valuable kind, he ordered more, leaving the vendor under the impression that his sample was of "Bassein" rice. *Held*, in a suit by purchaser against the vendor for non-delivery, that the purchaser might recover for the failure to deliver the rice sold under mutual mistake, but no recovery could be had for that sold where the mistake was that of the vendor alone, and known only to the purchaser; *Davis* v. *Reisinger*, 12 N. Y. App. Div. 767. Where one accepts an offer in which he knows the offerer errs as to the nature or extent of his promise, equity will compel him to elect to cancel the contract, or perform it rectified to suit the offerer's real intention; *Gerrard* v. *Frankel*, 30 Beav. 445. There need not be any misleading by express words, Blackburn, *J.*, in *Lee* v. *Jones*, 17 C. B. N. S. 482; but at what point communication of the fact known to one party only is required, and what may be concealed is the question on which the authorities differ. Bramwell, B. in *Lee* v. *Jones*, 17 C. B. N. S. 482. Here, however, as the purchaser knew not only the fact concealed to the vendor, but also that the vendor was contracting on the supposition of the non-existence of that fact, the case was correctly decided; *Smith* v. *Hughes*, L. R. 6 Q. B. 597.

TORTS.

Mental Suffering as a Cause of Action: Telegraph Co.'s Insult

A entered a railroad station to send a telegram from the telegraph company's office in the station. The agent in charge of the office ordered A to leave, insulted her and humiliated her by abusive language. *Held*, that since the telegraph company is a public service corporation, it has a duty to afford decent treatment to persons wishing to employ the company. That there had been a breach of this duty, and as a result A had suffered the injury of humiliation and wounded feelings and had a cause of action against the company. Court of Appeal, of Georgia, in *Dunn* v. *Western Union Tel. Co.*, 59 S. E. 189.

There is one class of cases in which mental suffering without any other injury has given rise to an action, namely, those cases

TORTS (Continued).

where mental anguish has resulted from the negligence of telegraph companies in misstating messages announcing sickness or death of a near relative; *Chapman* v. *Western Union Tel. Co.*, 90 Ky. 265; *Mentzer* v. *Tel. Co.*, 93 Iowa, 752.

But this rule is against the great weight of authority (Cooley Torts, 3d Ed., p. 92, and cases cited), and is rejected in Georgia in *Chapman* v. *Tel. Co.*, 88 Ga. 763.

It has been pointed out (*Tel. Co.* v. *Ferguson*, 157 Ind. 64) that the law takes cognizance of mental suffering in two classes of cases: (1) Where it is the result of some physical injury; (2) in such cases as malicious prosecution and libel. In both these classes of cases there is, however, a cause of action aside from the mental suffering. Here there is no injury aside from the mental suffering.

It seems, therefore, that the decision must rest on the ground that a telegraph company as a public service corporation owes extraordinary duties to the public in the course of its business.

BOOK REVIEWS.

REPORT OF THE TWENTY-NINTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION. Philadelphia: Dando Printing & Publishing Company. 1906. 2 Vols. Pp. 836 and 466.

This report includes the transactions of the St. Paul meeting of the Association. The record of the new statute law enacted during the past year, as set forth in the address of the president, George R. Peck, Esq., indicates clearly the alarming tendency of our law makers to pass many ill-considered and unnecessarily voluminous acts. This aspect of the new legislation is also emphasized by the paper by Hon. Alton B. Parker on "The Congestion of Law," in which the causes which have led to these conditions are carefully analyzed. The first volume contains also the reports of the usual committees, and the second the proceedings in detail of the various section meetings, including the valuable address of William Draper Lewis, Esq., as chairman of the Section on Legal Education on "Legal Education and the Failure of the Bar to Perform its Public Duties."

R. D. J.

THE LUNACY LAW OF THE WORLD. By J. A. CHALONER. Roanoke Rapids, N. C.: Palmetto Press. 1906. Pp. xxviii, 348 (unbound).

The purpose of this author is to call to the attention of lawyers and of citizens generally the "atrocious spectacle of an utter disregard for the very first elementary principles of common law, common justice and common sense" (p. xx). The central point in this lurid picture is the failure of the statutes of many states and foreign countries to require that specific personal notice shall be given to every alleged lunatic of the initiation of lunacy proceedings. The attitude of the author can hardly be considered impartial, in view of his extravagant language. Furthermore, his statements are sometimes misleading. For example, in the list of states where "no notice, express or implied, shall be given the alleged lunatic or the alleged incompetent" (p. xviii), is included Pennsylvania. As to incompetent persons, this is clearly an error, for both the

present Act of May 28, 1907, and the laws which it supplants, provide distinctly for written notice, which must be served upon the alleged weak-minded person. As to insane persons, the statement quoted above is misleading, for the Lunacy Act of June 13, 1836, provides for some form of notice, and it has been decided in *Comm.* v. *Groh*, 10 Pa. C. C. 557 (1891), that the failure to give notice will result in the setting aside of the subsequent proceedings. It is, of course, impossible to examine here the statutes of the various states, but the references above given are sufficient to show that the present book is hardly a dispassionate investigation of the subject. It is, however, doubtless true that in many jurisdictions the statutes on the subject of lunacy should be amended to provide more clearly for adequate personal notice of proposed lunacy proceedings. If the present work serves to call effective attention to these defects in our laws, its publication will have been justified.

R. D. J.

THE LAW AND PRACTICE IN BANKRUPTCY UNDER THE NATIONAL BANKRUPTCY ACT OF 1898. By WILLIAM MILLER COLLIER. Sixth Edition by Frank B. Gilbert. Albany, N. Y.: Matthew Bender & Co. 1907. Pp. liv. 1077.

So rapid has been the development of the law of bankruptcy under the Act of 1898 as amended and so numerous the decisions construing the intricate provisions of that statute that it is not surprising that after a lapse of only two years a new edition of Collier's Bankruptcy has been published. The present volume brings the work down to April, 1907, and includes all the decisions reported in the American Bankruptcy Reports to volume 17. In the treatment of the subject in the present revision there has been no departure from the general plan adopted in the previous editions. This is undoubtedly wise, because although that arrangement sometimes seems confusing it has the merit of familiarity to those who have used the earlier volumes. The new edition contains the full text of the Bankruptcy Act and the usual collection of forms for use in bankruptcy cases. Throughout is shown the same careful and thorough work which has earned for the work the approbation of so many practitioners in the bankruptcy courts.

R. D. J.

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FOREIGN ATTACHMENT IN PENNSYLVANIA. (AN OUTLINE.)

In the ordinary course of the law of England a creditor could not resort to the property of his debtor in satisfaction of his demand until he had brought suit and obtained judgment and issued execution. The initial seizure of the goods and chattels of a debtor, it may be inferred, originated in an analogy to arrest on civil process for the purpose of compelling the attendance of the defendant, or it may have sprung from an ancient Roman practice whereby the effects of a debtor who had secreted himself at home to elude persecution were appropriated to the payment of his debts, after three efforts to summon him had failed to induce him to appear. Research on this historical question is of little moment in view of numerous authorities which state the antiquity of the proceeding styled foreign attachment in the Mayor's Court of London as one of the customs of London.

The custom was first certified by Starkey, Recorder of London, in 1482, Hariot Mayor, 22 Edw., 14 L., 175.[1]

[1] Set out in the *Mayor & Alderman of the City of London* v. *Cox*, Law Reports, 1867, 2 H. L., 239, p. 242.

This description is given in Bohen's Privilegia Londini, p. 253, etc.

[1] By the Cuftom of London one may attach Money or Goods of the Defendants, either in the Plaintiffs own Hands, or in the Custody of a third perfon, and that either in the Maior's Court or in the Sheriff's Court.

And *Note*, That the Cuftom of London is, That if any Plaint be affirmed in London before &c. against any man, and he is returned [2] nihil, if the plaintiff will furnife any other man who is within the City, is Debtor to the Defendant, in any Sum, he shall have his Garnishment against him for him to come and answer if he be indebted in the Form which the other hath alledged; and if he comes and does not deny it, then this Debt shall be attached in his Hands.

Note, the Plaintiff ought to furnife, that the other man who is indebted to the Defendant, is within the City.

* * * All *Attachments* are grounded upon Actions of Debt, and the manner of entering *Attachments* is the same as is before mentioned for entering Actions: And one of the six officers belonging to this court ought be employed to make the same. * * * *

In *London Joint Stock Bank* v. *Mayor of London*, 45 L. J. Rep. Com. Law, p. 213 (1876), Lord Coleridge in his discussion of the question whether the custom of foreign attachment can be enforced against a corporation as garnishee gives many citations in regard to the origin and scope of the proceeding. It was definitely settled in *The Mayor and Aldermen of London* v. *Cox, supra*, (note 2) that the Lord Mayor's Court in London is an inferior court. From the procedure in such a tribunal sprang the body of statutes in the United States, with countless suits. When the reader dwells on the jurisdiction, the judges, the four counsel, the four attorneys, the executive officers of the Mayor's Court, he wonders at the broad outcome of the custom which was so limited and local in its nature. The current

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[1] It was said by Coleridge, *C. J.*, in *London Joint Stock Bank* v. *Mayor of London*, 45 L. J. Rep., 1876, C. L., at p. 219 that much of Bohen's book was taken from Lex Londinensis, published in 1680.

[2] See the third plea in *London Joint Stock Bank* v. *Mayor of London*, p. 216: "That afterwards at the same court, the said Sergeant-at-Mace, according to such custom, returned and certified to the same court, that the said Thomas Griesielle had nothing within the said city or the liberties thereof whereby he could be summoned, nor was he to be found within the same, &c."

from a narrow source has broadened into a mighty volume of legal business.[4]

Each state has its own system provided by legislative enactments. The present purpose is to indicate the practice in Pennsylvania.

STATUTES.

It appears from a manuscript volume of the laws passed prior to the year 1700, that the first act upon the subject was that of May 16, 1699. This act recognized and confirmed writs of attachment issued before that time. Sergeant on For. Att., p. 2, note A (a copy is printed in the appendix on p. 278).

Then followed the Acts of 1700 and 1701, which were afterwards repealed (Carey & Bioren, Vol. I, p. 8, p. 34).

The next statute was "An Act about Attachments," passed October, 1705 (1 Smith's Laws, 45). This did not distinguish between the two kinds of attachments, foreign and domestic, which were separate remedies, as is clearly shown by "An Act to rectify proceedings upon attachments," passed March 2, 1723 (Ca. & Bio., Vol. I, p. 193). Domestic attachments were regulated by this act and by subsequent ones which altered it.

This statement is made by Judge Sergeant:

> "But the Acts of Assembly, relative to foreign attachments, although they are the foundation of that mode of proceeding, are imperfect. Much of the law on the subject, and most of the forms of proceeding, are borrowed from the proceedings under the custom of London, which the legislature took for their model in framing the act of 1705, and are now sanctioned by legal adjudications and by practice."

It may be said, following this quotation, that more than threescore years have elapsed since the last edition of Judge Sergeant's treatise was published, and only the changes by decisions and legislation justify this imperfect supplement to his learned and admirable book.

In the Sixth Report of Messrs. W. Rawle, T. I. Wharton

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[4] Drake on Att., sec. 3. 2 Shinn on Att., p. 2.

and Joel Jones, the able commissioners appointed to revise the Civil Code of Pennsylvania, there was submitted a draft of a bill entitled "An Act relating to the Commencement of Actions," which was adopted and passed June 13, 1836 (P. L. 568), Sections 43 to 78, inclusive, of this act related to foreign attachments. The procedure under the system provided by this well-drawn law prevailed for many years, unbroken by innovations. It is still followed, with some changes which will be noticed in their appropriate places.

The first inquiry is:

Against what persons may a foreign attachment be issued?

In the Doctrine and Practice of Foreign Attachment in the Mayor's Court, London, by Robert Woolsey, Gent. (1816), on p. 23, it is said:

"The process of attachment seems, therefore, in its origin, to have been originally intended merely to compel the appearance of the defendant by sufficient sureties to answer the plaintiff's demand upon him. It was justly considered that the merchants of a great mercantile city would have debtors resident in foreign countries with no means (unless by their property here), of rendering them amenable to our courts of justice. The process of attachment was, therefore, probably devised; and hence, in our common law books, it is styled Foreign Attachment. But it may be remarked, that in the language of the city courts, all non-freemen are styled foreigners."

The 44th Section of the Pennsylvania Act of June 13, 1836, is as follows:

"A writ of attachment in the form aforesaid[6] may be issued against the real or personal estate of any person not residing within this Commonwealth, and not being within the county in which such writ shall issue, at the time of the issuing thereof."

It appears from the Report of the Commissioners that the words "and not being in the county," were intended to save a creditor from making inquiries in all the counties of the state before issuing his writ; "also because it is not probable that he would be acquainted with the fact of the defendant's presence in a distant county; and if the fact

[6] The form is given in the 43d section.

were made known to him it would avail him little, since the defendant would probably have left the commonwealth before a writ could be served upon him under such circumstances" (Report of Comm., p. 158).

Hence, there appear two tests; non-residence of the defendant, and that he is not within the county at the time of the issuance of the process of foreign attachment against him.

By the 76th Section of the Act of June 13, 1836, a writ of foreign atachment may be issued against any foreign corporation, sole or aggregate. In pursuance of this provision, it has been held that a corporation incorporated in another state is foreign, even if it has complied with the statutes of Pennsylvania, which specify an office and an agent within this state, the filing of a statement with the Secretary of the Commonwealth showing the title and object of the corporation, the location of its office or offices, the name or names of its authorized agent or agents therein. The argument that the primary object of a foreign attachment, that is to compel the appearance of the defendant, may be accomplished by the service of a summons on the legally appointed agent was overruled in decisions of courts of common pleas. Although the statutes (*e. g.*, April 21, 1858, P. L. 403; April 22, 1874, P. L. 108) were of later date, the affirmative force of the 76th Section of the Act of 1836 was upheld. The authority relied upon is *Chase* v. *Ninth National Bank*, 56 Pa., 355. The following are some of the cases in the lower courts, viz.: *Pierce* v. *Electric Co.*, 28 W. N., 311;[6] *Beal & Simmons* v. *Toby Valley Supply Co.*, 13 C. C., 273; *Pain's Pyro Spectacle Co.* v. *Lincoln Park & Steamboat Co.*, 19 C. C., 21; *Diener* v. *Wopsononock Hotel Co.*, 23 C. C., 376.

It has been held that an absconding debtor who has left his place of residence within this commonwealth is not

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[6] Notice the briefs of counsel in this report.

Abbreviations in this article: "Pa.," Pennsylvania State Reports; "Sup.," Pennsylvania Superior Court Reports; "C. C.," Pennsylvania County Court Reports; "Dist.," Pennsylvania District Reports; "W. N.," Weekly Notes of Cases.

liable to foreign attachment. *Scott* v. *Hilgert,* 14 W. N., 305; *Labe* v. *Brauss,* 12 C. C., 255; *Sheldon* v. *Forsman,* 17 Lancaster Law Review, 85; *Shenk & Peters* v. *Hall,* Id., 114. In *Whitehill* v. *Eicherly,* 15 C. C., 593, it was held by the Common Pleas of Lancaster County that a foreign attachment may be issued against a debtor who has left the state for the purpose and with the intention of taking up a new domicile previously determined upon, although he has not arrived at the new domicile. Judge Sharswood, in Reed's Appeal, 71 Pa., 378, after stating the decision in *Pfoutz* v. *Comford,* 12 Casey, 420 (from the syllabus?), that a debtor does not become a non-resident so as to subject him to a foreign attachment, by leaving his place of abode in this state and going to another to seek a new residence, but continues a resident of the state until he has another place of abode with the intention of remaining in it, further said:

"This decision accords entirely with all the authorities. Mr. Justice Grier expressed it clearly and tersely in *White* v. *Brown,* 1 Wall. Jr., C. C. R., 264: 'A man cannot be considered as a vagabond or a person without any domicil, for the domicil of origin is not abandoned until a new one has been intentionally and actually acquired.' A domicil once acquired remains until a new one is acquired actually, *facto et animo*; the fact and intention must concur: Story of Conf. section 47."

When does an assignment for the benefit of creditors by a non-resident pass the title to his property in Pennsylvania, and what is the effect of the Act of May 3, 1855, Section 1, P. L., 415, which requires the recording of such assignments in the county where the real or personal estate of the assignor may be? The answer is given, with abundant citations, in a note in 2 Purdon's Digest—Stewart—p. 1903, P. L., 17, of which a copy is as follows:

(q) This act is for protection of the citizens of Pennsylvania alone, and citizens of another state or of a foreign country cannot take advantage of it, or secure a preference over other foreign creditors by an attachment here, though the assignment is not recorded here, at least when the assignment is duly recorded in the state where executed or the attaching creditor has had notice thereof: *Bacon* v. *Horne,* 123 Pa., 452, 1889; *Cross* v. *Smith,* 14 Pa. C. C., 36, 1891; *Long* v. *Girdwood,* 150 Pa., 413, 1892; *Wing* v. *Bradner,* 162 Pa. 72,

1894; *Hilliard* v. *Enders*, 196 Pa. 587, 1900; see *Deni* v. *Pennsylvania R. R. Co.*, 181 Pa. 525, 1897, affirming 19 Pa. C. C. 7, s. c., 6 D. R. 15, 1896. And this construction of the statute does not violate article iv, section 2, of the constitution of the United States, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states:" *Hilliard* v. *Enders*, 196 Pa. 587, 1900. And its protection extends to creditors and purchasers only, and does not include the assignor, or any one who claims under him, *e. g.*, a second assignee: *Lewis* v. *Barry*, 72 Pa. 18, 1872; Smith's Appeal, 104 Pa. 381, 1884.

The question has been raised: Does not the 7th Section of the "Service" Act of July 9, 1901, P. L., 614, followed by the 17th Section of said act with the usual repealing clause, change the condition of the 44th Section of the Act of June 13th, 1836, viz.: "Not being within the county"?

The said 7th Section is in these words:

"*Seventh.*—The writ of foreign attachment may be served in the manner now provided by law, but the attachment shall be effective whether or not the defendant was in the commonwealth at the time the writ was issued or served."

The title to the Act of July 9, 1901, is in these words:

"An act relating to the service of certain process in actions at law, and the effect thereof, and providing who shall be made parties to certain writs."

It is submitted that the old provision recommended by the commissioners and embodied in the 44th Section of the Act of 1836 now maintains for the following reasons:

1. Mr. Justice Mitchell in *Park Bros. Co.* v. *Oil City, B. W.* 204 Pa., 457, in construing the Act of July 9, 1901, in the case of a suit against a corporation said after citing a prior section of the statute * * "These are the only portions of the act bearing upon the present inquiry, the others merely varying the allowable kinds of service under different circumstances. All of them relate solely to methods of service. No direct reference is made anywhere to the jurisdiction of the courts, nor is any such intent discernible in the title." To validate the conditions of the seventh section of the Act of 1901, would be in the words of Judge Mitchell on another point, "to turn an act whose title and plain general purpose relate solely to methods of service, into one making substantial changes in the jurisdiction of courts. * * * "

2. Does the above title of the Act of July 9, 1901, "Relating to service" express the actual change in jurisdiction? Is the provision of the seventh section constitutional under Art. iv, section 3, of the Constitution of Pennsylvania?

3. The Act of March 30, 1905, P. L. 76, seems to restore the provision "not being within the county in which such writ shall issue, at the time of issuing thereof"[7]

CAUSES OF ACTION IN FOREIGN ATTACHMENT.

Special statutes will be cited, but until a recent date, the writ, speaking generally, was issued only in actions *ex contractu*. This was clearly stated by Woodward, *J.*, in deciding that it would lie in account render, in *Strock* v. *Little*, 45 Pa., 416.[8] He said:

"Under the custom of London, all attachments are grounded upon actions of debt or detinue; but under our statutes, which, being remedial, are to be liberally construed, foreign attachments may issue in all actions sounding in contract where the plaintiff can swear to the amount claimed, or the court, upon a rule to show cause of action, can get at the sum in controversy wtih sufficient accuracy to fix the amount of bail which the defendant is to give to dissolve the attachments. * * * It will not lie in actions sounding in tort, for it was never designed as a remedy in such cases: *Porter* v. *Hildebrand*, 2 Harris, 131. Nor in actions *ex contractu* for unliquidated damages, for in such a case the court will have no standard by which to fix the amount of defendant's bail; but wherever, in actions *ex contractu*, the cause of action can be shown with such approximate precision as will enable the court to prescribe the amount of bail to the defendant, the writ may go."

The following extract from the opinion of Arnold, J.,[9] in *Snowden* v. *Fulford Planing Co.*, 19 C. C., 65, is an exposition of the Pennsylvania law on this point:

"Although nothing can be found in the civil code of June 13, 1836, which restricts the use of such writs to actions *ex contractu*, yet there are decisions of the Supreme Court, based on earlier statutes, which decided that a writ of foreign attachment cannot be lawfully issued in an action for a tort. See *Jacoby* v. *Gogell*, 5 S. and R., 450, A. D. 1820; *Porter* v. *Hildebrand*, 14 Pa., 129; *Boyer* v. *Bullard*, 102 Pa., 555, A. D. 1883. The first of these cases, *Jacoby* v. *Gogell*, was decided before the Act of 1836, and Tilghman, C. J.,

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[7] See *Lopez* v. *Donohue*, 15 Dist. Rep., 349.

[8] See the remarks of Judge Sharswood on *Strock* v. *Little* in *Knerr* v. *Hoffman*, 65 Pa., on p. 129.

[9] It is a very inadquate tribute to Judge Arnold's memory to add these words: He was a genial friend, an upright judge, a lovable man. He considered and discussed questions of practice with ardent interest and his clear and learned opinions are of great value to those who study them.

based his decision on the 'Act about attachments,' passed in 1705 (1 Sm. Laws 45), which in its preamble stated that the laws of this government might have been deficient in respect of a attachments for 'debts contracted or owing within this province.' The Act of March 2, 1723 (1 Sm. Laws 158), requires the plaintiff to make oath that the defendant is 'indebted' to him before the writ shall be issued; and the Act of September 28, 1789 (2 Sm. Laws 502), treats of the 'debt, claim or demand' of the plaintiff, from which the conclusion is deduced that only actions *ex contractu* can be commenced by a writ of foreign attachment. Further discussion of this subject, and an interesting and instructive analysis of the early statutes and decisions in this and other states, and also in England, may be found in *Redwood* v. *Consequa*, 2 Browne, 62, by Judge Hemphill; and *Fisher* v. *Consequa*, same book, in the appendix, p. 28, and 2 Wash. C. C. R., 382. Inferential argument in favor of this conclusion may be found in the Act of May 15, 1874, P. L. 183, allowing the issue of such writ against any person who, being a resident of this commonwealth, shall have removed therefrom after having become liable in an action *ex delicto*.

It is sometimes said that unliquidated damages arising *ex contractu* are not recoverable in an action commenced by a writ of foreign attachment, but this is too broad a statement. Such damages are so recoverable if they are capable of being reduced to a certainty by any fixed standard, as where the damages depend on the value or amount of goods produced or sold and a share of the proceeds or commissions for selling the same are claimed; but damages for the loss of the advantages of the arrangement cannot be so recovered: *Carland* v. *Cunningham*, 37 Pa. 228, an action between the plaintiff and defendant."

There are three statutes which authorize writs of foreign attachment in cases of tort.

An Act of April 6, 1870, P. L., 960, applies only to Philadelphia. It provides that in all cases of arrest for homicide, or for assault and battery resulting in great bodily harm to the person assaulted, so that life is imperiled, wherein the person arrested shall be held to bail and shall make default whereby his recognizance shall be forfeited, and shall flee the jurisdiction of the court, it shall be lawful for the person injured, his or her executors or administrators, to begin his, her or their action for damages by filing in the proper court an affidavit that the defendant has left, or is about to leave the jurisdiction of the court; whereupon the court shall award an attachment which shall have the same effect and proceedings as in cases of foreign attachment. It is said in 1 Br. Prac., Section 101, that this act was to meet a peculiar case.

An Act of May 15, 1874, P. L., 183, amended the 44th Section of the Act of June 13, 1836, to allow the issuing of

the writ of foreign attachment in all cases wherein any person, who, being a resident of this commonwealth, shall have removed therefrom, after having become liable in an action *ex delicto*. No writ shall be issued in such a case except upon oath or affirmation, previously made by the person having such right of action *ex delicto*, or by someone in his behalf, of the truth of the claim and of the facts upon which such attachment shall be founded, as well as that he verily believes that the person has removed to escape service of process to answer for such alleged tort; which oath or affirmation shall be filed of record. The proceedings subsequent to the issue of the writ shall be the same as in other foreign attachments.

The latest act, which amends the above 44th Section of the Act of 1836, is that of March 30, 1905, P. L., 76, and is as follows:

"A writ of attachment, in the form aforesaid, may be issued against the real or personal estate of any person not residing within this commonwealth, and not being within the county in which such writ shall issue, at the time of the issuing thereof, *in all actions* ex contractu *and in actions* ex delicto *for a tort committed within this commonwealth.*"

The first of these statutes, local in its scope, has not often been invoked, nor has the second or third. All are opposed to the origin, the theory and the practice of foreign attachment, but the last can afford the means of cruel oppression and injustice by tying up all of a non-resident's estate, which is within the limits of Pennsylvania (perhaps all that he owns), upon process which need not be supported—even by the *ex parte* preliminary affidavit of the claimant. The amount of bail named in the *praecipe* and writ is not required to be based upon any statement of the facts and circumstances of an alleged wrong, active or by negligence, of the defendant, or of any details on which to reach some measure of damages. The interests of the absentee are imperiled according to the caprice or malice or speculative craving of the plaintiff. Few cases are found in our Reports to show judicial interpretation of this act in substance, or in procedure.

An Act of May 23, 1887, P. L., 163, allows foreign attachment in *Equity*.

It provides:

"In any case in which a bill in equity may hereafter be filed against a defendant or defendants, not residing in the State of Pennsylvania, in which there shall be included a prayer of a decree for the payment of money, it shall be lawful for the plaintiff to cause a writ of foreign attachment to be issued against the real or personal estate of such defendant or defendants, in the following form." (Form of writ is given.)

The second section of the act provides for entry of a decree *pro confesso* against defendants who do not appear and answer the allegations of the bill at or before the first Monday of the third term next ensuing after the issuing of the attachment and subsequent proceedings, in the same manner as in foreign attachment in actions at law.[10]

Vessels. An Act of April 28, 1899, P. L., 102, provides in the first section:

"The right to commence an action by writ of foreign attachment shall extend to all actions, whether in tort or contract, against the owners, master or crew of vessels, or other structures upon navigable waters, for injuries caused to persons or property on land by such owners, master or crew, or their employes, in navigating or operating such vessels or structures, or in carrying on any work upon such vessels or structures."

The second section provides for the same proceedings as in foreign attachment.

The third section provides that when the vessel or structure goes beyond the limits of the commonwealth within thirty days after the cause of action arises, any limitation of time prescribed by law for bringing the action shall commence to run only from the time of the return of said vessel or structure to the Commonwealth.

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[10] The writer has not found any opinions reported which interpret this statute. There are two C. P. cases in the by-reports, *Stewart* v. *Parnell*, 8 C. C., 604, and *Crowe* v. *Davis*, 33 W. N. C., 552, the first to the effect that the attachment will not be dissolved on the filing of a formal answer, and the second that in an action of account render, brought by foreign attachment the plaintiff was given leave to file a bill in equity with the same effect as if the proceeding had originally been begun by bill in equity.

So far as reported cases go, this seems to be an unused statute.[11]

In support of the foregoing comment of the present writer upon the statutes which authorize foreign attachments [12] in tort, he quotes on the extension of the use of this proceeding an extract from the opinion of Judge Sharswood in Coleman's Appeal, 75 Pa., 441 (1874). He was a jurist, who, in addition to his great ability and learning, so widely recognized, had a long experience in the practical administration of commercial law. He said, page 457:

"It will be seen from this brief review that it has not been the policy of our jurisprudence to bring non-residents within the jurisdiction of our courts unless in very special cases. In proceeding against them for torts, even property belonging to them cannot be reached by process, and in cases of contract, nothing but the property can be affected unless the defendant voluntarily appear and submit to the jurisdiction. We may congratulate ourselves that such has been the policy, for nothing could be more unjust than to drag a man thousands of miles, perhaps from a distant state, and in effect compel him to appear and defend under the penalty of a judgment or decree against him *pro confesso*."

SALE OF PROPERTY BEFORE JUDGMENT.

When the goods attached are of a perishable or chargeable nature, the court, on the same being shown, will on motion, order them to be sold. The proceeds in such a case are paid into court, and the plaintiff cannot have an order to take the same out of court, until after final judgment against the garnishee. *2d Tr. & H. Prac., Sec. 2276.* But when sold, the title of the purchaser is indefeasible and unquestionable, *Megee* v. *Beirne,* 39 Pa., 50. Rule 20, Sec. 1 of the Courts of Common Pleas of Philadelphia is:

"No order shall be made for the sale of property seized on a writ of foreign attachment, unless the plaintiff or some other person acquainted with the facts, shall make affidavit that the demand of the plaintiff is just."

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[11] Qu. Was this act passed to cover some particular case?

[12] Which comment is of little moment, coming from him alone.

PROCEEDINGS.—*I. Attachment of Personal Property.*

The writ prescribed by statute is of this form:

COUNTY OF PHILADELPHIA, *ss.*: *Foreign Attachment.*

THE COMMONWEALTH OF PENNSYLVANIA,

To the Sheriff of the County of Philadelphia, GREETING:

WE COMMAND YOU, that you attach defendant late of your county, by all and singular goods and chattels, lands and tenements, in whose hands or possession soever the same may be, so that be and appear before our Court of Common Pleas, No of the County of Philadelphia, to be holden at Philadelphia, in and for the said County, on the first Monday of next, there to answer plaintiff of a plea of assumpsit, &c.

AND ALSO, that you summon as garnishees, all persons in whose hands or possession the said goods and chattels, lands and tenements, or any of them, may be attached, so that they and every of them, be and appear before our said court, at the day and place aforesaid, to answer what shall be objected against them, and abide the judgment of the court therein. And have you then and there this writ.

WITNESS the Honorable President Judge of our court at Philadelphia, the day of in the year of our Lord, one thousand nine hundred and

Prothonotary.

(Endorsed) Term, 190

COURT OF COMMON PLEAS, No.

Foreign Attachment.

Bail, $

Attach goods and chattels, lands and tenements, moneys, credits, legacies and interests of the defendant in the hands, possession or control of and summon as garnishee.

This is returnable to a term return day. In Philadelphia, it is also called a "Quarterly" return day; but Judge Thayer decided in *Taylor* v. *Tantum,* 18 *Phila.,* 414, that by Section 32 of the Act of June 13, 1836, P. L., 578, the writ may be made returnable to a return day of an intermediate month. It need not be issued ten days before the return day. Warner's Appeal, 13 W. N., 505.

The writ is obtained upon filing a *praecipe,* which may be like this:

J. W. C.
v.
A. B. K.
Prothy., C. P.

Issue writ of Foreign Attachment in Assumpsit or Trespass, returnable the Monday of 190 .
Bail $

The Sheriff will attach goods and chattels, lands and tenements, moneys, credits, legacies and interests of the defendant in the hands, possession or control of A. B., C. D., E. F. and of any other person or persons and summon the said A. B., C. D., E. F. and such other person or persons as garnishees.

A. H.,
Atty, for Plaintiff.

This copy of an old form is interesting.

"Praecipe in Foreign Attach:

C. M. C. } D. C.
v
D. M. B. } March Term, 1843, No. 7.

Issue Foreign Attachment Case Bail or deposit $6000. Rettle to 1 Mon. March, 1843
To attach goods, chattels, credits and effects in the hands of M. B. & Co. and summon them as garnishees.

E. K. P.,
for Plff.

E. C. Dale, Esq.,
P. D. C.
December 22, 1842.

Observe that in the tort cases under Acts of 1870 and 1874, *supra*, an affidavit is required. It would also seem to be good practice to file a preliminary affidavit in cases of tort under the Act of March 30, 1905.

The writ of foreign attachment is filled up, signed and sealed in the prothonotary's office and taken to the sheriff for service. That officer protects himself by taking from the plaintiff a bond with sureties.

THE BOND.

At this point it should be noted that there exists, apparently never repealed, legislation for Allegheny County (Act of May 19, 1871, P. L., 986), and for Philadelphia County (Act of April 10, 1873, P. L., 776), which relieves the

sheriff in those jurisdictions from responsibility for the acceptance of sureties. These statutes require that all bonds given to the sheriff in his official capacity, as indemnity for executing the writs therein named (foreign attachments, *inter alia*), shall be justified before the judge of the proper court (before the prothonotary in Allegheny County), and when the prothonotary shall certify said justification and approval to the sheriff, the bond shall become the property of the successful party to the suit without recourse to the sheriff, who may have executed said process or received said bond as indemnity.

This form of affidavit and approval of sureties is used in Philadelphia:

..... }
v.
..... }

Court of Common Pleas, No. .....
Term, 19..... No.....
Surety for .....
Amount of Property Secured, $.....
Penal sum of bond, $ .....

.....being about to become surety in the above entitled case, and being duly ..... according to law deposes and says:

1st. I reside at .....and my occupation is .....

2d. I am the owner of real estate in the County of Philadelphia as follows: .....
.....

3d. The value of said real estate is $..... and the rent .... It is assessed for the purpose of taxation, at the value of $..... and is so assessed in my name.

4th. There are ..... incumbraces against the said real estate as follows: .....
..... and there is no other judgment binding the said land or mortgages, ground rent or other incumbrance of any kind, except those above named.

5th. The title to the said real estate is in my own name, and the same is not subject to any trust.

6th. I obtained the said real estate in ..... by ..... from ..... and my deed therefor is recorded.

7th. There are ..... judgments against me.

8th. I am not surety in any other case, or for any public officer.

(Signature of Surety) .....

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[13] Failure to insert bail in præcipe not fatal, when defendant not prejudiced by the omission. See *Wallace* v. *Scholl*, 9 Sup., 284.

Sworn and subscribed before me .....190 ....
..... Prothonotary.

[24] Notice of application for approval of this surety was given to .....by writing on the ..... day of .....190 .....
Attorney for.....

The above-named deponent is approved as surety in the above case.

The bond in Philadelphia is in this form:

KNOW ALL MEN BY THESE PRESENTS, That we (Sureties approved by the Court) (Hereinafter called Obligors) are held and firmly bound unto Esquire, Sheriff of the City and County of Philadelphia, in the just and full sum of dollars, lawful money of Pennsylvania, to be paid to the said Esquire, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made and done, we do bind ourselves and each of us, our heirs, executors and administrators, and every of them, jointly and severally, firmly by these presents. Sealed with our seals, dated this day of in the year of our Lord one thousand nine hundred

THE CONDITION OF THIS OBLIGATION IS SUCH, That whereas, in and by a certain writ of attachment issued out of the Court of Common Pleas, No. for the County of Philadelphia, tested at Philadelphia, the day of 190 , commanding the said Sheriff that he should attach (Hereinafter called Defendant) by all and singular goods and chattels, lands and tenements, in whose hands or possession soever the same might be found in his bailiwick, &c., to answer (Hereinafter called Plaintiff) in a plea of assumpsit (Term, 190 , No.), which said writ is returnable the Monday of now next ensuing.

AND WHEREAS, The said Sheriff does not certainly know what are the goods and chattels of the said Defendant : Now if the said Obligors, their heirs, executors and administrators, shall and will save harmless and keep indemnified the above-named Sheriff, as aforesaid, and his Officers, and every of them, and his and their heirs, executors and administrators, and every of them, and his and their goods and chattels, lands and tenements, of and from all manner of suits, action and actions, damages, costs and charges whatsoever, that shall or may accrue to him or them, for or by reason of his or their executing the said writ; and if the said Plaintiff shall and will prosecute said plea against the said Defendant with effect according to law, and abide the judgment and award of said Court, that then the above obligation to be void and of non-effect, otherwise to be and remain in full force and virtue.

Sealed and delivered
in the presence of us:

(L. S.)
(L. S.)

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[24] Obviously, this notice cannot be required in for. att.

Notice the statement by Smith, *J.*, in *Clement to use, etc.*, v. *Courtright*, 9 Sup., 45, which was a futile attempt of a successful defendant in a foreign attachment to recover as assignee of the sheriff upon the bond of indemnity which had been given by the plaintiff and his sureties. This is the construction placed upon the bond:

"The purpose of the bond, as shown by the terms of the condition, and the preceding recital, was manifestly the protection of the sheriff and his officers, and there is nowhere anything to indicate that any protection to the defendants in the attachment was contemplated. Its condition, undoubtedly, embraced any liability which the sheriff incurred through the plaintiff's failure to prosecute with effect * * *."

SERVICE OF THE WRIT.

It is said in Troubat & Haly's Practice, Vol. II, Section 2261, that "the plaintiff's attorney sees that a description of the specific effects or property to be attached is indorsed by the prothonotary on the writ."

This is believed not to be the usual practice, but directions are given to the officer who serves the attachment, and in some way the goods and chattels should be pointed out by the plaintiff, or by someone in his behalf.

The sheriff may also summon as garnishees the persons who hold property or effects of the defendant, though such persons are not named in the writ.

The 48th section of the Act of June 13, 1836, provides:

"In the case of personal property, the attachment shall be executed as follows, to wit: The officer to whom such writ shall be directed, shall go to the person in whose hands or possession the defendant's goods or effects are supposed to be, and then and there declare, in the presence of one or more credible persons of the neighborhood, that he attached the said goods or effects."

The 50th Section is:

"The goods and effects of the defendant when attached in the hands of the garnishee, shall, after such service, be bound by such writ, and be in the officer's power, and if susceptible of seizure or manual occupation, the officer shall proceed to secure the same to answer and abide the judgment of the court in the case, unless the person having the possession thereof will give security therefor."

The sheriff's return should show all the essentials of service.

It was said in the *per curiam* opinion in *Hayes* v. *Gillespie*, 35 Pa., 155:

"In so severe a proceeding as a foreign attachment, we cannot doubt that the prescribed form of serving the writ, in order to attach real estate, must be strictly pursued."

This was approved, together with the opinion of Judge Sharswood, in *Lambert* v. *Challis*, in the old District Court of Philadelphia (in the note in 35 Pa., 156), in *Vandergrift & Forman's Appeal*, 83 Pa., 126, and *Byron* v. *Trout*, 90 Pa., 492. To the same effect is *Sterrett* v. *Howarth*, 76 Pa., 438.

These were attachments of real estate, but it may be asserted broadly, if an act prescribe the manner of making service of a writ in terms that are not merely directory, the provisions of the statute must be followed. Whether they have been or not (*i. e.*, is the service valid or defective?), must be decided by the court out of which the writ issued, and how can the court judge of the sufficiency of the service unless the doings of the sheriff in executing the writ are set forth in his return?

That the sheriff need not insert in his return the words of the 50th Section of the Act of June 13, 1836, above quoted, was decided in Jaffray's Appeal, 101 Pa., 583, which is a leading case on service of foreign attachments. The following summary by Judge Arnold in *Wanamaker* v. *Stevens*, 1 Pa. C. C., 317, is made with his usual care:

"The sheriff may, no doubt, make what is called a copy service of the writ on the garnishee, so as to bind a debt due by the latter to the defendant: *Morgan* v. *Watmough*, 5 Whar. 125; or even goods of the defendant in the garnishee's possession, so as to make the garnishee the bailee of the sheriff; the seizure being made in the manner in which it is made in the case of a levy under an execution: Jaffray's Appeal, 101 Pa. St. 583. But the plaintiff and the sheriff cannot, by a mere copy service of the writ, escape the risks of the attachment, when the defendant's title is disputed, and throw them all upon the garnishee, by requiring him to retain the goods to abide the result of the suit; in that case the sheriff must demand indemnity from the plaintiff and seize the goods: *Shriver* v. *Harbaugh*, 37 Pa. St. 339. A declaration of the attachment in the preesnce of one or more credible

witnesses of the neighborhood is, however, indispensable; *Penna. R. R. Co.* v. *Pennock*, 51 Pa. St. 244, decides this emphatically. It would be vain to discuss the reason or the wisdom of this requirement of the statute; it is enough for us to say that it is so written in the law."

This extract from the opinion of Morrison, *J.*, in *Munis* v. *Oliver*, 24 Sup. Ct., 64, may be added:

"In Jaffray & Co.'s Appeal, 101 Pa. 583, it was held that it was not necessary for the sheriff to take the goods into his custody to execute his attachment so as to bind the goods, that the levying and attachment may be done without either handling the goods or taking them into possession, and the property fully bound by it and be in the officer's power and the owner's possession thereby divested."

The proper practice where the sheriff's return is defective, is to set aside the return and the rule to show cause why it should not be set aside it seems may be taken either by the defendant or the garnishee.[15] *Wanamaker* v. *Stevens, supra.*

Observe: "The practice of setting aside service on rule has the sanction of precedents sufficient to prevent it from being pronounced irregular in cases where it reaches the desired end without inconvenience or injustice to either party. See *Parke* v. *Commonwealth Ins. Co.*, 44 Pa. 422; *Hagerman* v. *Empire Slate Co.*, 97 Pa. 534; *Hawn* v. *Penna. Canal Co.*, 154 Pa. 455; *Fulton* v. *Commercial Travelers' Accident Asso.*, 172 Pa. 117; *Bailey* v. *Williamsport, etc. R. R. Co.*, 174 Pa. 114; *Platt* v. *Belsena Coal Mining Co.*, 191 Pa. 215 and *Jensen* v. *Phila. M. & S. Ry. Co.*, 201 Pa., 603." Mr. Justice Mitchell in *Park Bros.* v. *Oil City, B. W.*, 204 Pa., 453.[16]

GARNISHEE.—*Who may be made, who may not be made garnishee?*

In general terms it may be said: (1) The garnishee must have possession of the personal property of the defendant, or (2) he must be liable, *ex contractu*, to the defendant, whereby the latter has, at the time of the service of the attachment a cause of action, present or future, against the garnishee. Some particular examples may be noticed. Thus, it has been held that a foreign corporation, qualified to do

[15] The effect of an appearance by the defendant and also the duty of the garnishee to the defendant will be hereafter considered.

[16] For an interesting discussion of the case of a foreign attachment laid by a "creditor-debtor" on money or property in his own hand. See 2 Tr. and H. sections 2283-2284.

business in Pennsylvania by compliance with the statutes (*e. g.*, Act of April 22, 1874, P. L., 108) for registration, appointment of agent—*et id omne*—can be summoned as garnishee.[17] *Barr* v. *King*, 96 Pa., 485; *Datz* v. *Chambers*, defendant, *& National Fire Ins. Co.*, garnishee, 14 C. C., 643. A municipal corporation cannot be made garnishee. *Erie* v. *Knapp*, 29 Pa., 173. Judgment against such a corporation cannot be enforced by ordinary execution. *Monaghan* v. *The City*, 28 Pa., 207; *in re Sedgeley Avenue*, 88 Pa., 509. All counties are exempt, and also public officers in regard to whom "considerations of public policy and convenience require that money in their hands should not be stopped while *in custodia legis*." Thayer, *J.*, in *Davies* v. *Gallagher*, 16 W. N., 147. So an official, whose duties are prescribed and regulated by law cannot be garnisheed in respect to property held by him in his official capacity, unless authorized by statute; *e. g.*, receivers, assignees, trustees.[18] In such a case, if there were statutory permission, judgment against the garnishee would be withheld if necessary for his protection, until the opinion of the court which appointed him could be obtained upon the propriety of the payment to the attaching creditors. *Conshohocken Tube Co.* v. *Iron Co.*, 167 Pa., 592.[19]

WHAT MAY BE ATTACHED.

While the plaintiff's claim against the defendant must be presently demandable, the claim of the defendant against

[17] As to service on foreign insurance companies see opinion of Thayer, *J.*, *Busch* v. *World Mutual Benefit Asso.*, 16 C. C., 361, under section 13 of Act of April 14, 1873, P. L. 27, amended by the Act of June 20, 1874, P. L. 134. See also *Kennedy* v. *Insurance Co.*, 165 Pa. 179.

[18] Limited space prevents further instances of those exempt from being made garnishees, but a long list with citations of authorities may be found under note C on pp. 1536 and 1537 in Second Purdon's Digest (Stewart), *q. v.* These are under the statute relating to attachments *sur* judgment, but that proceeding, so far as the status of a garnishee is concerned, and indeed in other respects, is closely analogous to foreign attachment.

[19] See Act of Congress of August 13, 1888. (U. S. Stat. at Large, 436.)

the garnishee need not be due. *Coaks* v. *White,* 11 W. N. 271. The plaintiff may recover money or goods which may come into the hands of the garnishee at any time after the service of the writ. *Sheetz* v. *Hobensack,* 20 Pa., 412, in which Lewis, *J.,* cites *Silverwood* v. *Bellas,* 8 Watts, 420, to show that an attachment was held to bind a sum of money which had been placed by an attorney in the hands of the garnishee as a mere messenger to convey to the debtor three years after the service of the writ of attachment. See *Mahon* v. *Kunkle,* 50 Pa., at p. 218, and *Hays* v. *Lycoming Ins. Co.,* 99 Pa., at p. 625. But if the statute requires a "seizure" of the goods in the service of the writ of attachment, as shown by Thompson, *J.,* in *Penna. R. R.* v. *Pennock,* 51 Pa., 244, and sustained as meaning at least such a seizure as is made by a sheriff on execution as stated in the opinion of Gordon, *J.,* in Jaffray's Appeal, 101 Pa., 583, it is difficult to see how the foreign attachment can bind the goods and chattels which are not in the hands of the garnishee when the writ is served, but subsequently come into his hands. Is there not a distinction between money and debts on the one hand and tangible personalty on the other hand? The Act of April 12, 1855, P. L., 213, that carriers shall not be made liable as garnishees with respect to goods *in transitu,*[20] and at the time of the service of process beyond the limits of this commonwealth, may be argued not to be an admission of previous liability, but to be in accord with the 44th Section of the Act of June 13, 1836. Wages, under the Act of April 15, 1845, P. L., 459, are exempt from foreign attachment. *Box Board Co.* v. *Rossiter,* 30 Sup., 23.

Debts payable in future, debts in suit, unsatisfied judgments, contingent liabilities, rents, money deposited in bank,

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[20] See reference in *Penna. R. R.* v *Pennock, supra,* on pp. 253 and 254 to *Digby* v. *Childs,* 12 Harris, p. 23. The question is discussed by Judge Thompson as to goods not within the county in which the writ of foreign attachment is issued.

unliquidated claims, may be attached, and goods "pawned, pledged and demised."[21]

By the Act of July 27, 1842, P. L., 436, legacies, devises and interests in decedents' estates are subject to attachment by any creditor of the legatee, devisee, or person having an interest (except legacies and distributive shares of married women; which, however, are attachable under Act of April 11, 1848, Sec. 6, P. L., 536; *Evans* v. *Cleary*, 125 Pa., 204. See Act of June 8, 1893, Sec. 3, P. L., 344). It was said by Reed, *J.*, in *Lorens's Administrators* v. *King*, 38 Pa., 93:

> "In *Sinnickson* v. *Painter*, 8 Casey 384, we determined that a foreign attachment will lie against a legacy or distributive share before any settlement of the estate of a decedent; and that it is in the power of the court to mould the judgment against the executor or administrator into such form that no injustice shall be done to any one."

Observe that a foreign attachment will not lie against the representatives of a deceased person for the debt of the latter. See cases cited by Paxson, *J.*, in *Williamson* v. *Beck*, 8 Phila., 269. To allow it would interfere with the distribution of estates prescribed by law.

While the common pleas has jurisdiction in the attachment case; on the other hand, if a creditor of one entitled to a legacy or distributive share of an estate attach the executor or administrator of such estate, the orphans' court will suspend actual distribution pending the determination of the attachment in the court of common pleas from which it is issued. This practice is indicated in *Del Valle's Estate*, 17 W. N., 30; *Buckius' Estate*, 17 C. C., 270. See *Fitler's Estate*, 14 W. N., 62. As it is frequently said, the attachment is an equitable assignment; as against the garnishee, the attaching creditor stands in the shoes of his debtor.

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[21] See for examples, P. & L. Dig. Dec. Vol. 8, cols. 12422, *et seq.* Also 1 Tr. & H. Pr. sections 1181, 1186.

The Rule on Plaintiff to Show Cause of Action and the Rule to Quash.

If the writ of foreign attachment has been legally served, the defendant or the garnishee may have a rule of course on the plaintiff, which may be thus taken:

C. P. No.

v. Term,

No.

For. Att., Assumpsit (or Trespass)

Prothy., C. P.

Enter a rule on the plaintiff to show cause of action and why the above attachment should not be dissolved, returnable (to the next rule day, specifying it).

X. Y.,

Atty. for , Garnishee.

(or E. F., Atty. for defendant.)

It is a step on thin ice for the defendant to take this rule in Philadelphia County, where he is not allowed to appear *de bene esse*. While the Rule of Court [22] is that "appearances shall be by a written order endorsed and filed in the prothonotary's office," it has been held that when a "defendant entered a rule on the plaintiff to show cause of action and why the attachment should not be dissolved, signing the *praecipe* or order with his name as counsel for defendant," and the rule was discharged, this was an appearance by the defendant. The general statement was made by Arnold, *P. J.*, in *Ruhland to use, etc.*, v. *Alexander*, 19 C. C., 577, thus:

"A defendant cannot be in and out of his case at his pleasure. When he appears for any purpose he is in court for all purposes, whether for his advantage or disadvantage; he is affected with actual notice and is subject to all the consequences and entitled to all the benefits thereof."

Before a general appearance, the defendant or the garnishee may move to quash the writ, or have a rule on plain-

[22] Rule 30, section 1.

tiff to show his cause of action and why the attachment should not be dissolved, but such right is waived by appearance. *Borough of Lansford* v. *Jones,* 5 Dist., 483, and cases there cited; *Black* v. *Brown,* 31 C. C., 639. Just in what way a defendant can, of his own motion, get the benefit of the rule on the plaintiff to show cause of action and yet avoid the risk of appearing generally in the suit, in counties where no appearance *de bene esse* is permitted, is not apparent, if full force be given to the words of the opinion in *Ruhland* v. *Alexander.* It is true that the course advised in *Pain's Pyro Speetacle Co.* v. *Lincoln Park & Steamboat Company.,* No. 2, 19 C. C., 23, *i. e.,* to request the garnishee to enter the rule, which the garnishee "may do, according to *Penna. R. R. Co.* v. *Pennock,* 51 Pa., 244;[28] and *Melloy* v. *Deal,* 124 Pa., 161; and should do so, according to *Baldy* v. *Brady,* 15 Pa., 103, and *Bank of Northern Liberties* v. *Munford,* 3 Grant, 232." These four cases did not arise upon the rule to show cause of action now under consideration, though the language of Coulter, *J.,* in 15 Pa., on p. 108, is broad: "But Baldy, the garnishee, was bound to make every just and legal defence which they * * * can make, or be answerable to them for the fund," and this is approved in *Bank* v. *Munford.* Judge Reed makes this general declaration: "It is true, a garnishee is bound to make every legal defence that a claimant of the fund might make.—3 Harr. 103" (*Baldy* v. *Brady*). Perhaps the effort to compel the plaintiff to show a sufficient cause of action by affidavit may be included in "every legal defence;" but if the garnishee be not so advised, or if he be in collusion with the plaintiff, the defendant cannot have the benefit of the prompt discovery which this old and well established rule should give him. There ought to be in courts which prohibit appearances, *d. b. e.,* some valid mode of appearing conditionally, *pro hac vice,* by which the attorney for an absent defendant would ascertain and get of record the averments of the plaintiff's claim. In counties where an

[28] As to right of garnishee, see *Gibney* v. *Pennsylvania Motor Car Co.,* 29 C. C. 651. Why not take the rule on his own behalf?

appearance *de bene esse* has not been abrogated, by rule of court, such a provisional appearance appears to be valid for the purpose of testing the plaintiff's right, on his own allegation, to the foreign attachment. It was adopted in *Lindsley* v. *Malone,* 23 Pa., 24, and is mentioned by Mr. Justice Mestrezat, without criticism, in *Bellah* v. *Poole,* 202 Pa., 71. While an appearance *d. b. e.* is conditional, if the writ be returned served it becomes general, unless on or before the return the attorney enters a *retraxit.*[24] Duncan, *J.,* 11 S. & R., 87. Yet, in a foreign attachment, the essential factor of which is the absence of a non-resident defendant, this qualified and limited appearance ought to be available. Further, uniformity in procedure throughout all the courts of common pleas of the state, as far as may be practicable, is desirable. The rule stated in *Turner* v. *Larkin,* 12 Sup., 284, "that a party may appear specially for the purpose of stating an objection without waiving it," clears up the difficulty on a rule to quash, even when appearance *d. b. e.* is forbidden by local court rule. Why not extend it to the case of a rule to show cause of action?

It has been stated that the plaintiff ought to file the affidavit of cause of action before the writ issues, but no decision to that effect has been found. The affidavit is only compellable by rule.

Perhaps these notions may be profitless, and it is well to turn from them and give due weight to these sentences from the opinion of Rice, *P. J.,* in *Nicoll* v. *McCaffrey,* 1 Pa. Sup., 187:

"The court will inquire into the cause of action on foreign attachment in the same manner as on a capias where the defendant's person is taken into custody, and for similar reasons, and will proportion the bail according to the justice and extent of the plaintiff's demand, or if no sufficient cause of action be shown the court will discharge the

[24] Notice a curious reverse position in *Everett* v. *Niagara Ins. Co.,* 142 Pa. 322, the case of appearances *de bene esse* by a defendant to set aside the return of service of the summons and after it was set aside the entry of a *non-pros.* on motion of defendant's counsel in default of a declaration filed by plaintiff within one year. Defendant was not in court. The entry of the non-suit was unauthorized. See opinion of Mr. Justice Mitchell on p. 330.

property from the attachment. Serg. on Foreign Att. 138, etc. The well settled practice on a rule to show cause of action is for the plaintiff to read his affidavit, and if that is sufficient the attachment will be allowed to stand. Counter affidavits tending to contradict the plaintiff, or setting up a defense to the action, are not read on the hearing of such rule, for the reason that it would tend, in practice, to a trial of the case by the court in advance."

The Weekly Notes of Cases, District Reports and County Reports, and local by-reports furnish abundant illustrations of the judicial interpretations of such affidavits and disposition of such rules. Out of the number it is thought that not one is more valuable, or more correctly states valid propositions than the opinion of Lindsey, *P. J.*, in *Sperry* v. *Ollie*, 32 C. C., 71, from which the following quotation is taken. Upon a rule on plaintiff to show cause of action and to dissolve a foreign attachment, the plaintiff asked leave to file a paper entitled "Amendment and Supplement to Plaintiff's Claim," to which it was objected that the plaintiff has no right to amend or supplement an affidavit of cause of action on foreign attachment:

"After argument this question was reserved for consideration with the question of the sufficiency of the plaintiff's statement as showing a cause of action.

The plaintiff has made no response to the rule on him to show cause of action, nor has he filed an affidavit of cause of action in accordance with the established practice. True, he has sworn to his statement of cabin, and we may perhaps treat it as an affidavit of cause of action. But if we so treat it, he cannot be allowed to amend it. *Eldridge* v. *Robinson*, 4 S. & R. 548; *Talheim* v. *Hoover*, 4 Pa. C. C. R. 172; *Shumway* v. *Webster*, 24 W. N. C. 336; *Sagee* v. *Rudderow*, 1 Pa. C. C. R. 373; *Jacobs* v. *Tichenor*, 27 W. N. C. 35.

There are a few cases in which amendments have been allowed.[*] But the great weight of authority is against allowing them, and we think there are paramount reasons for not allowing them. The question then is, does the plaintiff's statement show a cause of action in such explicit terms as the law requires?

The plaintiff must show such a cause of action, as would, prior to the abolishment of the acts for imprisonment for debt, have entitled him to hold the defendant to special bail; *Doane's Amrs.* v. *Penhallow*, 1 Dallas, 218.

"An affidavit filed in answer to a rule to show cause of action in foreign attachment, should be explicit and state in positive language, and with due particularity the circumstances constituting the ground of the plaintiff's demand." *McCulley* v. *Chisholm*, 19 Phila. 337.

"There is no reason why an affidavit in a foreign attachment should not be as strict as one to procure bail." *Mollet* v. *Fonsera*, 4 S. & R.

[*] See *Hallowell* v. *Canning Co.*, 16 Sup., 60.

543. In the following cases the affidavits were held insufficient: *Graham* v. *Canton & W. R. R. Co.*, 25 W. N. C. 65; *Insurance Co.* v. *Walker*, 1 Phila. 104; *Shumway* v. *Webster*, 24 W. N. C. 336; *Segee* v. *Rudderow*, 1 Pa. C. C. R. 373; *Talheim* v. *Hoover*, 4 Pa. C. C. R. 172; *Jacobs* v. *Tichenor*, 27 W. N. C. 35."

The learned judge further cites from the last case Judge Thayer's statement:

"An affidavit on which a foreign attachment is granted stands upon the same footing as an affidavit to hold to bail, and is subject to the same rules, including the rule that it can never be helped by a supplemental or amended affidavit.[26] This is the well settled law. If there have been aberrations from it by inferior courts at any time, we are not disposed to follow them, or to be led astray from it by false lights."

Care should be taken by plaintiff's counsel in preparing his affidavit. It should set forth the facts essential to the jurisdiction of the court to compel appearance by foreign attachment; *Hallowell* v. *Tenney Canning Co.*, 16 Sup., 60, notably the non-residence of the defendant; *Gibney* v. *Pennsylvania Motor Car Co.*, 29 C. C., 651. The advice in Brewster's Practice, Vol. I, Sec. 77, "In all cases you should have prepared, if possible, before you issue this writ, an affidavit of cause of action" is wise. Further, it should be most carefully drawn[27] to stand criticism as minute as in the case of an affidavit to hold to bail in a *capias ad respondendum*.

Quashing the Attachment.

There is in our practice a confusion between quashing a foreign attachment and dissolving it by making the above rule absolute. Every student of the subject is indebted to President Judge Rice, of the Superior Court, for his explanation of the use of the motion (or rule) to quash the writ. His own words are so explicit and instructive that they must be given. He said in *Nicoll* v. *McCaffrey*, *supra*, on p. 193 of 1st Superior Reports:

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[26] Contra: *Sims* v. *Stribler*, 16 Phila. 9 s. c. 14 W. N. 100; *Brock* v. *Brock*, 17 Phila. 156; *McCulley* v. *Chisholm*, 19 Phila. 337. The last of these was in 1888. The present writer has found little that is forcible in these, either in reason or in authority.

[27] This should be emphasized.

"II. Speaking of the power of the court to quash a writ or proceeding, Judge Thompson said: 'Thus it appears that this remedy is defined as only applicable to irregular, defective, or improper proceedings. It would be extremely hazardous to extend it to any other cases, unless where there is a consent of parties.' *Crawford* v. *Stewart*, 38 Pa. 34. It is sometimes contended that this remedy is only to be applied where it appears on the face of the writ or record of the proceeding that it is irregular, defective, or improper, and it is true that there is a distinction between quashing and dissolving, an attachment; a distinction too frequently disregarded in practice. But it is now too well settled by precedent to permit discussion, that the court has power to quash a writ of foreign attachment upon proof of facts which are not disclosed by the record, as, for example, that the defendant is a resident of the state[28] or that the property is not liable to foreign attachment: *Brown* v. *Ridgway*, 10 Pa. 42; *Holland* v. *White*, 120 Pa. 228; *McElroy* v. *Dwight*, 120 Pa. 232, note. It seems to be equally well settled that where a court of record may quash or dissolve on extrinsic evidence which cannot be put on the record, the presumption is that everything was done rightly and according to law. All that was brought up by writ of error or *certiorari* in such a case was the record, and as the evidence and the opinion of the court are no part of the record they could not be reviewed, although actually sent up with it."

This last statement is in accord with the decisions of the Supreme Court, of which a recent one is *Bellah* v. *Poole*, 202 Pa., 72, which was an appeal by the defendant from the refusal of the court below to quash a writ of foreign attachment. The plaintiff requested the court below to discharge the rule for two reasons: (1) That the defendant was a resident of the state of Delaware, and (2) that if he were a resident of Pennsylvania, he waived his right to raise that question by giving bond to dissolve the attachment. Testimony was taken before the trial judge and he discharged the rule, and this order was assigned for error. In his opinion, Mr. Justice Mestrezat said:

"The appellee has moved this court to quash the appeal on the ground that the order of the trial court refusing to quash the writ of foreign attachment is not reviewable. This motion must prevail under the settled practice of this court. In *Lindsley* v. *Malone*, 23 Pa., 24, which was a foreign attachment, the defendant entered a conditional appearance and obtained a rule on the plaintiff to show cause why the writ should not be quashed on the ground that he was a resident of the state when the writ was issued. Evidence was heard in support of the rule which, however, was discharged by the court. On a writ of error to this court, it was held that the action of the court below was not the subject of review by the supreme court. Knox, *J.*, deliver-

[28] Is the burden on the plaintiff to prove non-residence? See *Sibley* v. *Dougherty*, 9 Kulp, 185.

ing the opinion, observed that 'as there is no bill of exceptions to evidence on a motion for summary relief, the refusal of the district court to quash the writ cannot be reviewed here,' citing *Miller* v. *Spreeher*, 2 Yeates, 162; *Shorts* v. *Quigley*, 1 Binn., 222, and *Brown* v. *Ridgeway*, 10 Barr, 42. To the same effect are *Philadelphia & Reading Railroad Co.* v. *Snowden*, 161 Pa., 201, and *First National Bank* v. *Crosby*, 179 Pa., 63, in the former of which it is said in the opinion that 'refusal of the court below to set aside the return to the writ of foreign attachment and to quash the writ is not a final judgment, and is, therefore, not subject to an appeal.'"

Reverting to the opinion[29] of Judge Rice in *Nicoll* v. *McCaffrey*, this further rule is deduced and shown (see 1 Sup., pp. 196 and 197):

"Generally speaking a writ of error lies in all cases in which a court of record has given a final judgment or made an award in the nature of a final judgment." (Then the learned judge gives illustrations.) He then shows that the appellate court will not review the decision of the court below upon questions of fact; "because the writ brings up nothing but what appears upon the record, and the evidence is not part of the record."

These conclusions may be stated: (1) An appeal will not lie from a refusal of the court below to quash a foreign attachment; (2) it will lie from an order which quashes the foreign attachment, but (3) in no case will anything *dehors the record* be considered by the appellate court.

The Progress of the Suit.

If the attachment be not dissolved or quashed, one of several courses may follow.

1. The defendant may not appear.

2. The defendant may appear and give bail and dissolve the attachment.

3. The defendant may appear, but not give bail and the attachment is not dissolved.

1. The Act of May 10, 1889, P. L., 183, amended Section 53 of the Act of June 13, 1836, and is:

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[29] The opinion distinguishes between facts shown by evidence, as to which it "would not be the province of the reviewing court to pass upon the credibility of the witnesses or to decide as to the weight of the testimony" and facts agreed upon and made part of the record.

"It shall be lawful for the plaintiff at and after the third term of the court after the execution of the writ, to take judgment against the defendant for default of appearance unless the attachment before that time de dissolved: Provided, That the plaintiff fifteen days prior to the entry of said judgment shall have filed his declaration."

The time for filing the declaration was thereby made reasonable and easily practicable.[30]

When may the judgment for want of an appearance be entered? "At the third term after the execution of the writ;" *i. e.*, after service of the writ. The case of *Wallace* v. *Scholl*, 9 Sup., 284, illustrates this. It was an appeal from the Common Pleas of Northampton County, in which there were six terms each year, thus:

January,	commencing	2nd	Monday	of January.
March,	"	"	"	" March.
May,	"	"	"	" May.
July,	"	"	"	" July.
September,	"	"	"	" September.
November,	"	"	"	" November.

A writ of foreign attachment was issued, returnable the second Monday of May, which was served on one garnishee on April 23d and on another on May 1st. Judgment was entered against the defendant for want of an appearance, on September 20th. The writ was "executed;" that is, served on the garnishees, in March Term. The first term "after" began on the second Monday of May; the second term "after" began on the second Monday of July; the "third term of the court after the execution of the writ" was the one that began on the second Monday of September. In that term judgment was entered, which was held to be correct by the lower and by the appellate courts. Smith, *J.*:

"The return of a writ is no part of its execution, no matter when made. 'To execute a writ is to do the act commanded in the writ;' Bouvier. The officer is given until the return day to execute process,

[30] In *Melloy* v. *Deal*, 124 Pa., 161, it was held upon the authority of *Foreman* v. *Schricon*, 8 W. & S. 43 and succeeding cases, that the declaration must be filed before the return day of the writ. It is refreshing to read the dissenting opinion of Mr. Justice Mitchell (pp. 168, *et seq.*). No one who had to do the thing practically, under the exigencies of active business, could or would have invented the time requirement of *Foreman* v. *Schricon*.

and is then required to inform the court how he performed his duty. But the return is no part of the execution of the writ. It is simply an account or report of the manner of its execution rendered to the court whence it issued and is usually endorsed thereon. * * * According to the sheriff's return the acts required by the statute to constitute an execution of the attachment had been performed and completed on May 1. It is clear, therefore, that the writ in the present case was duly executed before the commencement of the May term, and the judgment was properly entered at the September term, which was the third term after such execution."

In Philadelphia there are four terms in each year, beginning respectively, on the first Mondays of March, December and June, and the third Monday of September. In *Shuster* v. *Bonner*, 7. W. N., 17, the writ was issued on September 14th, returnable the third Monday of September, but was *served on return day*. Judgment by defendant was taken on the nineteenth of the following March. A rule to strike off the judgment was made absolute. Thayer, *P. J.*, said:

"The plaintiff was not entitled to judgment until 'the third term after the execution of the writ.' The first term *after* the execution of the writ was December term. The judgment was, therefore, premature."

It need not be argued that where there is no appearance judgment cannot be taken against the absent defendant for want of an affidavit of defence; not even in the case of real estate attached and service on the premises on the party in possession. *Watts* v. *Fox*, 64 Pa., 336.

The third term as determined by those cases having arrived, and the declaration ("statement," in present parlance) having been filed, the plaintiff may file this short order, viz.:

v. } C. P. Term, No.

For. Att. Assumpsit.

Prothy., C. P.,

Enter judgment in favor of the plaintiff against the defendant in above for want of an appearance.

A. H.
Atty. for Plaintiff.
1908.[a]

[a] No attorney should neglect to fold and properly endorse every paper which he files in the office of a prothonotary.

It is the practice not to do this until the fourth day of the third term, that is, on the *quarto die post,* by analogy to the *dies gratiae* under the 33d Section of the Act of June 13, 1836, P. L., 568.

Assessment of Damages.

The Act of April 9, 1870, P. L., 60, authorizes the plaintiff, after judgment by default,[82] to enter a rule on the prothonotary to assess the damages, which the prothonotary may do, upon evidence produced to him, or upon the affidavit of the plaintiff, or some other person cognizant of the transaction.

This rule may be entered, of course, without applying to a judge, thus:

v. } C. P.
Term,
No.
For. Att. Assumpsit.

AND NOW, to wit, 1908, on motion of A. H., attorney for the plaintiff, the court grants a rule on the prothonotary to assess damages in above.

Damages assessed by the prothonotary on judgment in foreign attachment against defendant for want of appearance without this rule to assess damages have been held to be in violation of the Act of April 9, 1870. *Keystone Brewing Co.* v. *Foristal,* 13 Luzerne Legal Register, 244; *Oliver* v. *Becker,* 15 Dist., 599. To these citations others may be added on this point, and to the further requirement that an affidavit of claim (or, it may be inferred, "evidence produced before him") is necessary to justify the assessment of damages by the prothonotary. *Seymour* v. *Fulton,* 9 Dist., 611, in which there is an interesting discussion by Stewart, *J.; Odenkirk* v. *Odenkirk,* 11 Dist., 42.

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[82] This judgment is merely *in rem. Steel* v. *Smith,* 7 W. & S., 447; *Glenn* v. *Davis,* 2 Grant, 153; *Smith v. Eyre,* 149 Pa., 272.

AFFIDAVIT OF PLAINTIFF'S CLAIM FILED FOR ASSESSMENT OF DAMAGES.

v. } C. P. Term, No.

For Att. Assumpit.

County of , *ss.:*

, the above named plaintiff, being duly according to law, says that the above named defendant is justly and truly indebted to him, the said plaintiff, in the sum of dollars with interest thereon from the day of , 1908, for goods and merchandise, to wit, sold and delivered at by the plaintiff to the defendant at the defendant's special instance and request at the times and in the quantities and for the amounts specified in the* annexed (or the following) account which is a true and correct copy of plaintiff's book of original entries. That no part of the amount has been paid and the whole thereof is justly due and unpaid.

(Sign)

Sworn (or affirmed) to and subscribed before me this day of A. D. 1908.

If the suit be for breach of contract, or on other grounds, the affidavit should explicitly aver all the essentials to show a complete cause of action. If the claim be on a promissory note, bill of exchange, or instrument of writing, copies of the same should be set out in the affidavit; or the original, as "evidence produced before him" may be exhibited to the prothonotary; but even then, it will be well to have an affidavit of claim.

If the affidavit of "some person cognizant of the transaction," other than the plaintiff, be filed with the prothonotary, it should state why such person makes it, and also set out his knowledge.

Ordinarily, as the proceeding is *ex parte,* careless practice is not questioned; but the garnishee may attack the judgment that has been irregularly entered.

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*Add—"Said copy is marked A and is made a part of this affidavit."

ASSESSMENT OF DAMAGES.

C. P.
Term,
No.
For. Att. Assumpsit.

v.

AND NOW, to wit, 1908, in accordance with the rule entered on the prothonotary to assess the damages in the above case and upon the affidavit of the plaintiff (or of a person cognizant of the transaction), I assess the plaintiff's damages as follows, to wit:

Amount of claim for goods sold and delivered as set forth in said affidavit, ... $ _____
Interest thereon from . . . . . _____

Prothonotary.

Or,

[84] ASSESSMENT OF DAMAGES.

Caption

AND NOW, to wit, 1908, under the rule entered on the prothonotary to assess damages and upon the evidence of X examined under oath before the prothonotary [and upon the production of[85] (promissory note of the defendant date payable after date for the sum of $), which was given in evidence by the plaintiff] the plaintiff's damages are assessed by me as follows:[86]

Amount of claim on (state it) . . . . . $ _____
Interest from _____

Prothonotary.

These forms are open to correction. They might be multiplied to show varieties of demands. The purpose is simply to impress painstaking compliance with the provisions of the statute.

ABATEMENT OF ATTACHMENT.

If the plaintiff fail to file a statement of his cause of action within one year after the issuance of the writ, such writ shall abate without any further action by the defend-

[84] See—1 Brewster's Pr., sec. 87.

[85] If other paper, *e. g.*, bond, bill of exchange, written contract, &c., describe it. It is better to err, if at all, in particularity. If only oral testimony be given let the attorney for plaintiff see that the substance is embodied in the assessment signed by the prothonotary or his deputy.

[86] In cases of tort damages are assessed by writ of inquiry.

ant or garnishee and its lien shall thereupon cease. Act of May 12, 1897, Sec. 1, P. L., 62.

Therefore, a plaintiff who wishes to go on with his claim must be careful not to let the year glide away with neglect on his part of this step in the case.[37]

This is the formula: File statement within the year and fifteen days before taking judgment by default.

2. ATTACHMENT DISSOLVED BY DEFENDANT ON GIVING SECURITY.

If the defendant at any time before the payment of the money put in and perfect bail (to the plaintiff's action in the sum demanded, or in such sum as the court, upon the cause of action shown, shall order), or make a deposit in the manner provided upon a *capias ad respondendum* (*i. e.*, pay the amount into court), the attachment, and all proceedings had thereon shall be dissolved. Act of June 13, 1836, Sec. 62, P. L., 583.

The bail shall be bail absolute, in a recognizance in double the amount in controversy, as nearly as may be ascertained, with one or more sufficient sureties conditioned for the payment of the debt or damages, interest and costs that may be recovered. Act of March 20, 1845, Sec. 2, P. L., 189.

Considerable time has been spent in a futile search for some authoritative decision in regard to the form and the obligee in this recognizance. The words of the statute just given do not prescribe these.

The forms in Smith's forms, p. 423 (referred to in note to Sec. 2274, in 2 Tr. & H. Prac.), and in Dunlap's Forms, p. 187, are alike, and they are substantially the same as that set out in *Wright* v. *Keyes*, 103 Pa., 567. The instrument of writing in that case was as follows:

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[37] *Held*, in *Seymour, et al, Receivers*, v. *Fulton*, 9 Dist., 611, that where the statement had been filed before the return day and after the expiration of two years by leave of court, plaintiff filed an amended statement that if the original statement was defective, the amended one was too late. If the amended statement did not introduce a different cause of action, is not the accuracy of this open to question?

D. M. Wright
v.
S. S. Moses

In the Court of Common Pleas of McKean County, of February Term, 1877, No. 179.

Foreign attachment in debt, $1000. McKean County, *ss.*:

We, S. S. Moses, the above defendant, and D. J. Keyes, of the County of McKean, severally acknowledge ourselves to be indebted to the said D. M. Wright in the sum of one thousand dollars, to be levied of our goods and chattels, lands and tenements, respectively, and to be void on the condition that the said S. S. Moses shall pay to the said D. M. Wright the debt or damages, interest and costs that may be recovered against him in said foreign attachment.

Taken and acknowledged March A. D. 1877.

S. S. Moses, (L. S.)
D. J. Keyes, (L. S.)

This was acknowledged by D. J. Keyes before a justice of the peace, as follows:

State of Pennsylvania, County of McKean, *ss.*:

Personally appeared before me, C. C. Moses, a legally commissioned justice of the peace, in and for the said county, D. J. Keyes, of said county, who acknowledged the above to be his signature, who also swears that he is worth the full and true sum of one thousand dollars over and above his just debts and amount exempted by laws of Pennsylvania from levy and sale on execution.

Sworn and subscribed before me this 14th day of March, A. D. 1907.

D. J. Keyes,

C. C. Moses, Justice of the Peace, (L. S.)

The bond and acknowledgment were filed of record in the Court of Common Pleas of McKean County, and the sheriff permitted the defendant to remove the attached lumber.

In a suit in debt on the above bond, Keyes contended that there could be no recovery, it being in form a recognizance, and not having been approved or taken by the proper court, but by a justice of the peace, it failed to meet the statutory requirements of such a recognizance, and was therefore void. This contention was sustained by the trial judge, and he instructed the jury to find for the defendant. Verdict accordingly and judgment thereon. Writ of error by plaintiff who assigned for error the instruction of the court. Reversed by Supreme Court. It was held that the instrument on its face was a complete bond. "He (defendant) gave his bond, and if the property was released without objection by the plaintiff, there is no equity in his favor."

It was conceded that the obligation was void as a recognizance. This would follow from the fact that it was not entered into before a court, or officer duly authorized. A justice of the peace had no such authority. It would seem that the form of the instrument was not condemned, but the failure of approval by the court or a competent official. Court of Common Pleas No. 1, of Philadelphia, in *Reis* v. *Junker*, 9 Dist., 296, made absolute a rule to show cause why the garnishee in a foreign attachment should not give a bond to the sheriff, conditioned for the return of the goods, the sheriff thereupon to withdraw, etc. The garnishee claimed the goods which had been attached as his own property and took the rule.[88] The case has been cited as if it showed that the recognizance should be given to the sheriff in case of an appearance and dissolution of a foreign attachment upon bail by the defendant.

It is not easy to see why it should not be taken in the name of the plaintiff, who alone is interested in the "debt or damages, interests and costs," when the attachment is compulsorily dissolved by the action of the defendant under his statutory right; the recognizance, of course, to be approved by the court, or commissioner of bail duly appointed. The action of the court in dissolving the foreign attachment protects the sheriff in withdrawing his levy on the goods. The above sections of the Act of June 13, 1836, and of the Act of March 20, 1845, do not mention indemnity to the sheriff.

The 2d Section of Rule 20 of the courts of common pleas, of Philadelphia county, is:

> "In cases of foreign attachment, bail shall not be taken in order to dissolve the attachment, without first giving notice to the plaintiff or his attorney, of the time and place of taking such bail, that he may have an opportunity of excepting to the sufficiency thereof."

After the defendant has entered a general appearance he cannot raise "any question affecting the irregularity

[88] The 50th section of the Act of June 13, 1836, provides, unless the person in possession will give security therefor, *i. e.*, take the bond of the garnishee. See Jaffray's Appeal, 101 Pa., p. 391. A different "situation" from bail to dissolve by defendant.

of the process. He admits it by appearing." Craig, *P.J. Borough of Lansford* v. *Jones*, 5 Dist., 483.

It was said by Judge Woodward in *Megee* v. *Beirne*, 39 Pa., 51 (on p. 62): "Foreign attachment is not purely a proceeding *in rem*, but under our statute it is the equivalent of a summons for commencement of a personal action," and it was said by Judge Mitchell in *Longwell* v. *Hartwell*, 164 Pa., 533 (on p. 538): "Foreign attachment is a proceeding *in rem*. by attachment of a non-resident's goods, with the primary object of compelling the defendant's appearance." By the giving of bail the attachment is dissolved; the court has jurisdiction over the defendant *in personam;* the suit proceeds as if it had been begun by a summons which had been duly served.

Judgment may be entered against the defendant who has appeared in a suit of foreign attachment in assumpsit under the Act of May 25, 1887, P. L., 271 (sometimes called the "Statement Act;" sometimes the "New Procedure Act"), for want of an affidavit of defence. *Wing* v. *Bradner*, 162 Pa., 72. This was the case of an appearance under the 64th Section of the Act of June 13, 1836, in which the defendant did not give bail or security, but the basis of the requirement to file an affidavit of defence was that he had caused a general appearance to be entered for him.[89] See also *Railroad* v. *Snowdon*, 166 Pa., 236. (The report of this case shows only that defendant had entered a general appearance. It does not state that bail had been entered to dissolve the attachment.) See *Allen* v. *Allen*, 23 W. N., 371; *Smith* v. *Eyre*, 26 *Ibid*, 314.

If no affidavit be required, or if a sufficient affidavit of defence be filed by the defendant, the case goes on to issue and trial.

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[89] There would be force in the contention against the right to judgment for want of an affidavit of defence that the words of section 63 of the Act of June 13, 1836, "and the action shall proceed in like manner as if the same had been commenced by writ of *capias ad respondendum*," if this section had been enacted after the Act of 1842, which abolished imprisonment for debt. In 1836 a capias was issued in actions of assumpsit. It was not restricted as specified in the first section of the Act of July 12, 1842, P. L., 339.

3. *Appearance, but Attachment not Dissolved.*

The defendant, instead of giving bail or security at his election, may, under the 64th Section of the Act of June 13, 1836, cause an appearance to be entered for him and take defence; in which case the action shall proceed as if by summons, and the attachment shall continue to bind the property, "the estate or effects attached," as in other cases. 2 Tr. & H. Prac., Sec. 2281.

It appears that the distinction between the operation of this section and the 63d Section is in these respects: (1) The giving or not giving of bail, and (2) the retention or loss of the lien of the attachment.

The proceedings after the appearance of the defendant, it is submitted, are alike in all the subsequent steps in the progress of the suit to judgment.

If judgment in either case be entered by default for want of affidavit or defence, or of pleas, then proceed as pointed out under 1 *supra*, where defendant does not appear —except that damages in action of tort are assessed by writ of inquiry.

PROCEEDINGS AGAINST GARNISHEE AFTER JUDGMENT AGAINST DEFENDANT.

It has been remarked that a foreign attachment means two suits. One is plaintiff *v.* defendant; the other plaintiff *v.* garnishee. The second now is to be considered. By the 54th section of the Act of June 13th, 1836, the plaintiff, after judgment against the defendant, may have a writ of *scire facias* against the garnishee, commanding him to appear at the next term and show cause, if any he have, why the plaintiff should not have execution of his judgment "of the estate and effects of the said defendant attached as aforesaid in his hands or possession." By section 55, Interrogatories may be exhibited to the garnishee "touching the estate and effects of the defendant in his possession or charge, or due and owing from him at the time of service of the writ or at any other time."

It has been held that if the garnishee has appeared in the suit begun by foreign attachment, no writ of *scire facias* is required against him.

"When the garnishee appears in response to the clause of summons in a writ of attachment a *sci. fa.* is unnecessary, for the purpose of the *sci. fa.* is to compel an appearance, and when that already exists on the record, there is no necessity for requiring a repitition of it." Arnold, *P. J., Philadelphia Textile Machinery Co.* v. *Aetna Fire Ins. Co.*, garnishee, 9 Dist., 44.

It is hard to answer this opinion and yet the words "next term" in the 54th section may be construed to afford the garnishee an extension of time and mean that he is entitled to the issuance of a *scire facias* even if he has appeared to the attachment.

Further, it is believed that the usual practice is to issue the *scire facias* and have it served on the garnishee. The original foreign attachment simply summoned the garnishee. The *scire facias*

"makes known to the said garnishee that he be and appear before * * * to show if anything he knows or has to say why the said plaintiff should not have execution of the judgment aforesaid, of the proper goods and chattels, rights and credits of the said defendant in the hands or possession of the said garnishee."

This is after judgment against the defendant, and is a writ calling on the garnishee who has been summoned to appear to do more; *i. e.*, show cause as is set forth in the *scire facias*.

This writ is obtained by a præcipe thus:

A. B.
v.
C. D. defendant.
E. N. garnishee.

C. P.
Term
No.

For Att. assumpsit—(or trespass)

Prothy., C. P.

returnable [*]

Issue *Scire Facias* against the garnishee in above

A. H.
Atty. for Plff.

[*] State return day; not, *sec. leg.*

If the garnishee fail to appear, or if he appear and fail to answer the interrogatories of which a copy has been served upon him,[41] judgment may be entered against him by default; mark, by default.

Acknowledgment is due to Judge Mitchell for the patient study and clear conclusions shown in his opinion in *Longwell* v. *Hartwell,* 164 Pa., 533. That was an attachment execution, but the practice in that proceeding follows that in foreign attachment. The best solution of what had been obscure is found in his summary (on p. 542), which is now quoted:

"The result of all our cases may be summed up in the following propositions:

1. The garnishee failing to appear after service of the attachment, with clause of summons, but no specific attachment of goods or credits, plaintiff will be entitled to a judgment by default. But such judgment will be interlocutory only, and plaintiff cannot liquidate it, or have execution, without first by writ of inquiry or before the prothonotary as the rules of court or the practice in cases of default may prescribe, establishing his claim by evidence of the garnishee's possession of goods or credits of the defendant; and the measure of his damages will be the value of such goods. This is the present case.

2. If the attachment is levied upon specific goods, the default may be taken as an admission of the possession of such goods, but the plaintiff must, by writ of appraisement or otherwise, establish their value.

3. If the attachment is of money, or a debt, and the amount appears in the sheriff's return the default is an admission of all the requisite facts, and no further evidence or inquiry is necessary. This is *Layman* v. *Beam.*

4. The proper form of the judgment is for plaintiff against the garnishee, and that the garnishee has in his hands certain goods, effects or credits, to wit (naming them), of the value, etc., or that the garnishee is indebted to the defendant in the sum of, etc.

5. Plaintiff's measure of damages, which determines the amount of the judgment against the garnishee, is the value of the goods attached, of course not exceeding the amount of his judgment, interest and costs against the defendant. The single exception is when the garnishee neglects or refuses to answer interrogatories, in which case, by the express terms of sec. 57 of the Act of 1836, the judgment against him is that he has goods or effects of the defendant sufficient to satisfy the plaintiff's demand, and execution may issue against him as for his own proper debt."

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[41] By section 3, rule 20 C. P. Philadelphia County, the rule may be entered upon the garnishee to answer the interrogatories in fifteen days. Printed forms of interrogatories, with the order for the entry of this rule and notice to garnishee endorsed, may be bought of the law stationers.

By section 4 of Rule 20, if the plaintiff does not within three months

ANSWERS OF GARNISHEE AND THE PRACTICE RELATING THERETO.

By section 56 of the Act of 1836, upon a rule granted upon the motion of the plaintiff, it shall be the duty of the garnishee to make "full, direct and true answers" to the interrogatories.

The answers may admit an indebtedness of the garnishee to the defendant. If this be so the plaintiff may enter a rule of course, thus:

Caption }

Proth'y. C. P.

Enter a rule on garnishee in above to show cause why judgment should not be entered against him for the amount admitted in his answers to be due by him to the defendant—returnable on (fill in the next rule day of the court).

Signed, A. H.
Attorney for plaintiff.

If the admission be not of an indebtedness in money but of personal property in the hands of the garnishee, the rule should be to show cause why the plaintiff should not have execution to be levied on the estate and effects of the defendant admitted by the answres of the garnishee to be in his hands and possession or of so much of them as shall be sufficient to satisfy the plaintiff's judgment against the defendant, besides costs of suit.

It has been repeatedly held that

"the answers of a garnishee are not to be construed with the same strictness as an affidavit of defense, and judgment will not be entered on answers unless the answers do by fair interpretation admit an indebtedness due to the defendant * * * .A garnishee is entitled to the protection of the court, and a judgment should not be entered

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after judgment issue a *scire facias* against the garnishee, or when the garnishee has entered an appearance, of the plaintiff did not file interrogatories and serve a copy thereof on the garnishee within three months, the court upon motion of the garnishee, if no sufficient cause is shown for the delay, may order the attachment to be dissolved. By section 5, the garnishee may enter a rule on the plaintiff to file interrogatories within fifteen days after service of notice of the rule—judgment of *non pros.* to be entered in case of default.

against him when there is doubt as to the defendant's title to the fund attached." *Conshohocken Tube Co.* v. *Iron Car Co.*, 167 Pa., 592. No list of citations beyond this is needed, but see *McCallum* v. *Morris*, 179 Pa., 427.[a]

Yet the answers may be insufficient, evasive, lacking information which should be stated. The practice seems to permit the plaintiff in such a case to follow any of several courses. He may take a rule for judgment against the garnishee for want of sufficient answers. He may demur to the answers, but the rule to show cause is the proper practice—*Schlayer* v. *Bowers*, 30 Pa., C. C., 535. Or he may file exceptions to each answer to which he objects and on the hearing of his exceptions the court may order the garnishee to answer further.

See opinion of Head, *J. McGeary* v. *Huff*, 31 Sup., 401 (on p. 404). See also under title "Executions," 1 Tr. & H. Pr. sec. 1201, and note 1 on p. 698. The plaintiff may except or demur, *Hagy* v. *Hardin*, 186 Pa., 428.

If the plaintiff be dissatisfied with the denials in the answers of the garnishee, or if he does not choose to file interrogatories, he may rule the garnishee to plead to the *scire facias*, thus:

} C. P.
Term
No.

Sci. fa. sur foreign attachment.

Proth'y C. P.

Enter a rule on garnishee to plead in fifteen days[b] or judgment sec, reg.

A. H.
Attorney for plaintiff.

The usual plea is *nulla bona*, thus:

} C. P.
Term
No.

The garnishee pleads
nulla bona.

J. F.
Atty. for garnishee.

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[a] Approved, 186 Pa., p. 430.

[b] Fifteen days under Phila. C. P. Rule.

This plea is that the garnishee had no goods or moneys of the defendant in his hands, at the time of the service of the suit or attachment, or at any time thereafter.[44] If there be any defence, *e. g.*, a lien in his own favor on the goods, a prior attachment, set-off, it will be safe for him to plead specially or give notice of special matter. In *Allen* v. *Erie City Bank*, 57 Pa., 129, in which there was a question of the right to offer evidence under the general plea, it was said by Thompson, *C. J.*, at page 139,

"We see not, under the pleadings, how the evidence could have been received. Conceding that it might possibly have been evidence under the plea of *nulla bona*, with notice of special matter, notice was not given. The plea without this, we think, only puts in issue the question of goods and effects in the hands of the garnishee. This is not only reasonable in itself, but seems to be supported by *Flanagin* v. *Wetherill*, 5 Whart., 286, *McCormack* v. *Hancock*, 2 Barr, 310, and Sergeant on Attachment, 90. That notice of special matter should have been given in the case where the plea was *nulla bona*, and the offer was to show lien for freight due the garnishees, was held in *Wood* v. *Roach*, 1 Yeates, 177."

The right of the garnishee to defend, is thus stated by Mr. Justice Fell *in Willis* v. *Curtze*, 203 Pa., 111:

"'Generally the garnishee in a foreign attachment may make any defence against the plaintiff in the writ that he could make against his original creditor. The judgment in the attachment establishes only the existence of the debt due the plaintiff by his immediate debtor. The plaintiff stands in no better position as to the thing attached than does his debtor, and any defense good against the latter will prevent a recovery against the garnishee—" citing cases.

An interesting note upon the question whether a garnishee may or should interfere in behalf of the defendant is found at the foot of the report of *Lane* v. *White*, 24 W. N., 380:

"While the garnishee in a foreign attachment is not a party to the judgment against defendant in the writ, it is not quite accurate to say he is a stranger thereto in the sense intended by plaintiff. The judgment is necessarily the foundation of subsequent proceedings against th garnishee, by which it is sought to take the property or effects of the defendant, attached in his hands, and apply the same to plaintiff's claim. As a general rule the garnishee is bound to see that the proceedings to that end are not illegal. In a legal point of view, his rela-

[44] 2 Tr. & H., sec. 2288.

tion to the defendant in a writ of foreign attachment is not always the same. In some cases he is simply bailee of defendant's property. In others, he is his debtor, or he may be either bailee or debtor with a counter claim of his own, consisting of a special lien or a set-off; or, he may be a trustee of money or property under a valid trust created by the defendant in favor of another party. In either case, when he occupies the position of bailee or trustee, it is his right, as well as his duty, for his own protection, if nothing more, to insist that no property or effects be taken out of his hands, except upon valid process. That duty, if it has not existed before, certainly arises when the garnishee is called upon by *scire facias* to show cause why plaintiff should not have satisfaction of his judgment out of the estate or effects of the defendant in his hands or possession. The *scire facias* is predicated of a valid judgment against the non-resident defendant, and if the garnishee is aware that no such judgment exists, or if he has any other just ground of defense, he has a right to interpose it. If he neglects to do so, and the attached property is taken from him, he may become personally liable to those whose interests he could and should have protected: 2 Tr. & Haly Prac., sec. 2289; Serg. on Att., 113, etc.

It has been held that under the general plea of *nulla bona* the garnishee may, on trial of the issue, take advantage of the invalidity of the judgment on which the *scire facias* issued: *Pancake* v. *Harris*, 10 S. & R., 109; *Thornton* v. *Bonham*, 2 Pa., 102. If he can do that, there is no good reason why he may not apply to the court in behalf of the non-stricken off, as was done in this case." Mr. Justice Sterrett in *Melloy* v. *Deal & Burtis*, 124 Pa., 161.

It was said by Mr. Justice Agnew, in line with this, but not on the same point: "The garnishee must give notice to his own creditor if he would protect himself; *Morgan* v. *Neville*, 74 Pa., 52.

INTERPLEADER.

The garnishee may disclaim all interest in the subject matter of the action (that is the claim of the defendant against him which the plaintiff "in the shoes of the defendant" seeks to recover from the garnishee or in goods and chattels which have been attached). If the garnishee so disclaim he is entitled to an interpleader upon his suggestion between "some person not a party to the action," and the plaintiff in the foreign attachment under the provisions of the Act of March 11, 1836, P. L., 77, *Barnes* v. *Bamberger*, 196 Pa., 123.[45]

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[45] This obviates any consideration of the Act of June 10, 1881, P. L., 106, for an interpleader in foreign attachment. This Act of 1881 was said to be unconstitutional in *Reynolds Lumber Co.* v. *Reynolds*, 4 Dist., 573, but?

INTEREST.

This last cited case also reiterates the rule that "a foreign attachment suspends the interest on so much of the debt as will be required to satisfy the plaintiff's demand."

The exception is in a case where there has been collusion, unreasonable delay, or litigation on the part of the garnishee; *Jones* v. *Mfrs. Natl. Bank*, 99 Pa., 317, and cases cited by Trunkey, *J.*

COSTS—COUNSEL FEE.

A garnishee without fault may recover costs; *Barnes* v. *Bamberger, supra.* By the Act of April 22, 1863, sec. 1, P. L., 527, a garnishee is entitled to a reasonable counsel fee out of the property in his hands; either if after issue joined he be found to have in his possession or control no property of the defendant nor to owe him any debt other than admitted in the plea or answers, or if the plaintiff without going to trial take judgment against the garnishee for what is admitted in his plea or answers.[46]

The Act of June 11, 1885, P. L., 107, provides that where

"the garnishee may be found to have in his possession or under his control no real or personal property of the defendant nor to owe him any debt the said garnishee shall be entitled to recover from the plaintiff in addition to the costs already allowed by law a reasonable counsel fee not exceeding ten dollars, to be determined by the court, and taxed as part of the costs." Amended by Act of April 20, 1891, P. L., 35, viz.: where there are several garnishees each may be allowed a counsel fee.[47]

JUDGMENT AND EXECUTION.

As stated in the fifth proposition of the opinion in *Longwell* v. *Hartwell*, on page 543 of 164 Pa.,

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[46] The practice does not seem to be uniform upon the taxing of a garnishee's counsel fees when the garnishee has a surplus remaining in his hands above the amount of the plaintiff's judgment. See note to *Getz* v. *Smith*, 29 W. N., 459.

[47] See *Lummis* v. *Big Sandy Land & Mfg. Co.*, 188 Pa. 27. (Counsel fee $250 awarded. The contention must have been as to the right to the fee, not its amount.)

"where the garnishee neglects or refuses to answer interrogatories * * * * by the express terms of section 57 of the Act of 1836, the judgment against him is that he has goods or effects of the defendant sufficient to satisfy the plaintiff's demands, and execution may issue against him as for his own proper debt."

By section 59—If issue be had and a trial had upon the *scire facias*, the jury must find what goods and effects, if any, were in the hands of the garnishee, and the value thereof. The judgment is an award of execution, to be levied of the goods and effects so found by the jury, or so much of them as shall be sufficient to satisfy the plaintiff's demand, together with legal costs; 2 Tr. & H. Prac. sec. 2291.

By section 60—If the garnishee, after judgment against him on the *scire facias*, neglect and refuse to produce and deliver the goods and effects of the defendant or to pay the debt or duty attached, the plaintiff shall have execution against the garnishee as in the case of his proper [46] debt.

Security to Restore.

The 61st section of the Act of June 13, 1836, requires the plaintiff before execution to

"give security by recognizance and sufficient securities to be approved by the court, or by one of the judges thereof in vacation, with condition, that if the defendant in the attachment shall within a year and a day come into court and disprove or avoid the debt recovered against him, or shall discharge the same with costs, in such case the the plaintiff shall restore to the defendant the goods or effects, or the value thereof, attached and condemned, etc."[47]

The recognizance need not be given, according to *Fitch* v. *Ross*, 4 S. & R., 557, before issuing execution. It is in time if given before the sale. By Act of May 8, 1855, sec. 2, P. L., 532, if the plaintiff wait a day and year, leaving the property unsold he may then proceed to sale without giving security.

These provisions of the statute regulating foreign attachment show much consideration for the absent defendant, as does this further proceeding, viz., the

SCIRE FACIAS AD DISPROBANDUM DEBITUM.

By this writ the right is exercised of disproving the debt within a year and a day, which is secured to the defendant

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[46] See as to executors and administrators, garnishee, *Lorens* v. *King*, *supra*, and as to execution against garnishee *de bonis propriis*, *Fredrick* v. *Easton*, 40 Pa., 419. Also see *Fitch* v. *Ross*, 4 S. & R., 557. For form of judgment against executor, see *Maurer* v. *Kerper*, 102 Pa., 444.

[47] See Smith's Forms, p. 420 for form of recognizance, and garnishee an executor, p. 422 (Act of July 27, 1842 P. L. 423).

by the statute. The manner of proceeding to disprove the debt under the custom of London is set forth in Sergeant on Foreign Attachment, pp. 48-50. The following statement by Shippen, President in *McClenachan et al.*, v. *McCarty*, 1 Dallas, 375, has never been questioned. He wrote:

"The attachment law, and all proceedings under it, suppose the defendant to be an absent person, and *he has, in truth, no day in court*, till he enters special bail; and thereby dissolves the attachment; or comes in afterwards, when the money is recovered from the garnishee, to disprove the debt, which is done by a *scire facias ad disprobandum debitum;* in either of which cases he puts the plaintiff upon the legal proof of his demand, and is admitted to make a full defense."

The proceeding is not clarified by decisions, and the writ is very seldom issued.[80] From the opinion of Stroud, *J.*, in *Bujac* v. *Phillips*, 2 Miles, 71, a case in which the plaintiff in the *scire facias* was the executor of the defendant in the foreign attachment, the following extract is in point:

"It was objected, in the *second* place, that no security similar to that which is required by the *custom of London*, as a pre-requisite to the right of issuing a *scire facias ad disprobandum*, has been entered by the administrator of the original defendant. The nature of this security, under the custom, is not very distinctly defined, but it would seem to be that of special bail. Whether the language of the Act of 1705 calls for the exaction of such security, even where the defendant is alive and sues out the *scire facias* himself, is a point not altogether plain. In *Fitch* v. *Ross*, 4 S. & R. 564, Judge Duncan says he may come in within a year and a day, etc., and contest the demand of the plaintiff "*without* entering special bail." As the plaintiff retains the fruits of the execution in the attachment until the defendant succeeds on the *scire facias ad disprobandum*, there is but little reason for requiring security of any description from the defendant, who seeks in this manner to contest the validity of the plaintiff's original proceeding. But, however this may be, where the defendant in the attachment is alive, and has recourse to this writ, we think the exemption from giving bail, etc., which generally obtains in regard to persons suing in a *representative capacity*, should, in this case, be extended to a party so circumstanced. A different conclusion would, in most instances, be a denial of the right so to interpose altogether.

The time for issuing such writ runs from the taking out execution against the garnishee. *Id.*

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[80] On the best authority it may be said that only one instance is known of the issue of this writ in Philadelphia in fifteen years.

II. Attachments of Real Estate.

By section 49 of the Act of June 13, 1836, the attachment shall be executed as follows:

I. If the attachment be levied on houses, other buildings, or lands, it shall be the duty of the sheriff to leave a copy of the writ with the tenant or other person in actual possession, holding under the defendant in the attachment, and to summon him as garnishee.

II. If there be no person in actual possession as aforesaid, the sheriff shall publish a copy of the writ, for six weeks, in one newspaper printed in the county, if there be one, otherwise in one newspaper published nearest to the land attached, and such writ shall also be published in one or more newspapers in the city of Philadelphia, or elsewhere, as the court, if in session, or a judge thereof in vacation, at the time of issuing the same, having reference to the supposed place of residence of the defendant, shall direct.

III. If the attachment be levied on a rent charge, it shall be the duty of the sheriff to leave a copy of the writ with the owner of the messuage, lot, or land out of which such (rent) shall issue, or upon which the same shall be charged, or if such owner shall not reside within the country, upon the tenant or other person in possession of such messuage, lot, or land, and in either case, to summon such person as garnishee.

IV. In all other cases of incorporeal hereditaments, the attachment shall be executed by leaving a copy of the writ with the person or persons who may be liable to the payment of money to the defendant, or who may be charged with, or otherwise liable to the defendant in respect or such hereditament, and if there be no such person, by publication as directed in the case of houses or lands, of which there shall be no person in possession as aforesaid."

Rents.

Sections 65 to 69 of the Act of 1836 provide for proceedings in cases of attachment executed upon land which shall have been demised for years or otherwise with a reservation of rent. The delivery of a copy of the writ of attachment, shall have the effect of sequestering in the hands of the latter all rents due or to accrue until the execution against the garnishee, unless the attachment be sooner dissolved. The court may at any time after the return of the attachment, on application of the plaintiff, and affidavit of a just cause of action, issue a writ to the sheriff, requiring him to collect and secure from the tenant of the premises, all such rent as shall have accrued at the time of the execution of the writ of attachment, or as may accrue thereafter, until

the further order of the court. No such order can, however be made, unless the sheriff return that the tenant holds under the defendant in the attachment. Under such writ, the officer shall, by virtue thereof, proceed, from time to time, to recover such rents, in like manner and with like powers as are, or shall be possessed by a landlord, under the laws of the commonwealth; and it shall be his duty, forthwith, on the receipt of any moneys arising from the recovery of such rents, to bring the same into court; such rents when paid into court, remain impounded, and a third party cannot be permitted to take the money out of court, without a *scire facias* against the tenant. (This concise summary is copied from 2 Tr. & H. Pr., sec. 2279.) If the rents are not so collected by the sheriff, the plaintiff may after judgment against the defendant, proceed by *scire facias* against the tenant as garnishee, the proceedings being the same as hereinbefore set out in case of attachment of debts owing by garnishee to defendant. The plaintiff upon award of execution may have the money that has been paid into court paid to him upon giving security to restore; or if the rents and profits of the real estate be insufficient to pay his judgment with the interest, costs and charges, he may proceed by *scire facias* for the condemnation and sale of the real estate as in other cases. (See *Id.*, sec. 2280.)

Where lands are attached judgment may be entered against the defendant as in case of personalty, *supra*, for want of an appearance, or if he appear and do not give bail and dissolve the judgment then as in other suits. Execution may issue on the judgment without a *scire facias* (when no tenant as garnishee), *Gibson* v. *Robbins*, 9 Watts, 156.

It would be good practice, it is suggested, in the case of execution against real estate, to present to the court affidavits of real estate brokers or conveyancers, averring their knowledge of the value of the premises and how obtained and their valuation of the real estate, in order to have the amount of the plaintiff's recognizance determined by the court. These affidavits should be filed, with the papers of record in the foreign attachment, in the office of the pro-

thonotary. As with other "*fi. fas.* to condemn" a description of the land should be given to the sheriff with the execution—attached to the writ.

ESTREPMENT.

By the Act of May 8, 1855, sec. 4, P. L. 533, after the execution of any writ of foreign attachment upon the lands and tenements of the defendant or upon lands held by the lien of any judgment or mortgage owned by the defendant, any court, if in session, or any judge in vacation, upon petition and affidavit, in the usual form, of the plaintiff, or some one in his behalf, may award and allow a writ of *estrepment* to say waste upon such lands and tenements, as in other cases.[51]

INTEREST OF MORTGAGEE OR JUDGMENT CREDITOR.

By the third section of this Act of 1855 a foreign attachment against the interest of a non-resident who is a mortgagee or judgment creditor, whose debtor, by judgment or mortgage, is a non-resident and cannot be personally served as garnishee, may be executed by attaching or levying the same upon the lands, tenements or hereditaments upon which said mortgage or judgment is a lien or incumbrance in the same manner as such writs are executed upon the lands and tenements of the defendants therein. Upon final recovery by the plaintiff in such attachment it shall be lawful for the courts to subrogate the plaintiff in the attachment to the right of the mortgagee or judgment creditor—but before such subrogation shall be made the same security must be given as before execution is issued upon judgments in foreign attachments.

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[51] For estrepment generally see 2 Tr. & H. sections 1856-7.

THE LIEN OF FOREIGN ATTACHMENTS.

"The goods and effects of the defendant in the attachment, in the hands of the garnishee shall, after such service, be bound by such writ." Act of July 13, 1836, sec. 50.

In Long's Appeal, 23 Pa., 297, it was held that there was no priority between several writs of foreign attachment served or levied on the same day on real or personal estate. In this regard there is a difference between such writs and writs of *fieri facias* which take priority in the order in which they are delivered to the sheriff. The point is past doubt or question. The opinion of Pennypacker, *J.*, affirmed by the supreme court, *Underhill* v. *Nice,* 175 Pa., 39, in giving preference to an attachment under Act of March 17, 1869, P. L., 8 ("against fraudulent debtors"), over a foreign attachment which went into the sheriff's hands the same day but after the former had been served, reiterates the thought "that in judicial and other public proceedings there are no fractions of a day, and that all transactions of the same day are in general regarded as occurring at the same instant of time." Hence there must be a statutory provision, describing precedence.

So by the fifty-first section of the Act of 1836, "foreign attachments executed upon real estate shall bind the same against purchasers and mortgagees from the time of the execution thereof"—and judgment creditors, Schacklett's Appeal, 14 Pa., 326. As to this last class, Gibson, *C. J.*, said, after quoting the words,

"Purchasers and mortgagees;"—"and judgment creditors are neither The clause, however, is but another proof that every codification of the law must necessarily be lame and imperfect, though executed by the ablest hands.[a] The case of a judgment creditor is not within the letter of it, but is within its equity; and the letter would die did not construction come to its assistance."

The plaintiff's attorney should cause a description of the land to be annexed to the foreign attachment, and also an

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[a] This wise assertion of a great judge is not in accord with the comfortable thought of the modern mind, fertile in "legislative expression."

additional description, for the fifty-first section requires the sheriff to file in the office of the prothonotary of the court a description of the property attached within five days after he shall have made the attachment, which description shall be entered by the prothonotary upon his docket and the names of the parties, with the date of the execution of the writ and the amount of bail required shall be entered upon his judgment-docket.

Even if the omission of the prothonotary to make such entry does not destroy the lien of the attachment against a subsequent mortgage without notice as was held in *McLaughlin* v. *Phillips*, 10 C. C., 382, none the less it is the part of wisdom on the part of the plaintiff's attorney to see that this effort to give constructive notice is duly made. It is submitted that there is force in the opinion of Judge Wickes on the obligation of the plaintiff in the foreign attachment. *Schall* v. *Rutledge*, 1 York, 33. He regards the duty of the plaintiff analogous to that of a judgment creditor to see that his judgment is rightly entered, citing *Ridgway, Budd & Co.'s Appeal*, 15 Pa., 177, and other cases.

PROCESS AND PROCEEDINGS WHERE ONE OR MORE OF THOSE JOINTLY LIABLE TO SUIT ARE NOT LIABLE TO FOREIGN ATTACHMENT.

The seventieth section of the Act of June 13, 1836, provides for a writ of attachment and summons combined and prescribes its form. *q. v.* The substance of this remedy is to be found in 1 Br. Pr., sec. 103. The summons is against the defendant or defendants within the jurisdiction, the attachment against all other defendants.

"The plaintiff proceeds under the summons against all it embraces, and so with the attachment. If judgment be entered against the first, execution issues; if this be not satisfied, it shall be lawful for the plaintiff to levy upon the goods attached. The court, however, has power to award execution if they see cause against the goods attached in the first instance, saving to all defendants their respective rights.

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[a] See under Act of May 25, 1887, P. L. 271 *Corry* v. *R. R. Co.*, 194 Pa. 516.

If any defendant summoned obtain judgment upon a plea in bar of the whole action, and the plaintiff do not, within a year and a day sue out and prosecute a writ of error, the attachment may be dissolved."

The case proceeds against "the defendants attached" in the manner hereinbefore provided where all the defendants in such writ are attached.

The attachment does not bind partnership property, but the separate property of the non-resident defendant. White & Schnebly's Case, 10 Watts., 217. This form of attachment was held not to lie in cases of tort, because it applies only in cases of joint liability and in tort all the defendants are severally liable. *Boyer* v. *Bullard,* 102 Pa., 555—but, may plaintiff waive the tort and claim on contract when there is a contract either expressed or implied?[58] See *Boyce* v. *Permanent Life Ass.,* 218 Pa., 494.

It would be a pleasure to extend this article, already too long, and to consider the relation of suits begun by foreign attachment to some of the questions which are cognate to those so ably and fully treated in the English and American editions of Smith's Leading Cases in notes to the Duchess of Kingston's case, but a rapid discussion of such legal topics is simply impossible. It is a familiar rule that a judgment entered by a court having jurisdiction of both the parties and the subject-matter will be binding until the same is vacated or reversed. This is extended to judgments in cases of garnishment, but how far? Prohibitions of time and of space leave no opportunity to examine this subject. For condensed statements of the authorities in Pennsylvania the reader is referred to 8 Pepper & Lewis Dig. Dec., cols. 12478-12495. The cases are carefully digested under the heads: 1. When the attachment is pending. 2. When judgment has been obtained against the garnishee and paid by him.

For convenient reference this article may end with a partial

SYNOPSIS.

I. Statutes—Principal one, June 13, 1836, P. L. 580.

Some extensions and amendments, viz; 1842—attachments of legacies, etc.

Acts cited here for subjects, not in order of date.

A. Causes of Action—Contracts, until TORT Acts of April 6, 1870, P. L. 960. (Local Philadelphia.)
and May 15, 1874, P. L. 183,
and March 30, 1905, P. L. 76.
In *Equity*, May 23, 1887, P. L. 163.
Against *vessels*, April 28, 1899, P. L. 102.

B. Affecting procedure.
May 8, 1889, P. L. 183, Judgt. by default.
April 9, 1870, P. L. 60, Assessment of Damages.
May 8, 1855, P. L. 532, Attachment of Interest of mortgagees or judgment creditors.
May 8, 1855, P. L. 533, sec. 4—Estrepment to prevent waste.
April 22, 1863, P. L. 527
June 11, 1885, P. L. 107
April 29, 1891, P. L. 35
} Counsel fee of garnishee.
May 12, 1897, P. L. 62 Abatement of writ for want of statement.
June 10, 1881, P. L. 106. Interpleader, but see 196 Pa. p. 123.
May 8, 1855, P. L. 532. Execution without security to restore.

II. When does foreign attachments lie?

against
- (a) Individuals.
- (b) Corporations.
- (c) Non-resident assignors for benefit of of creditors,
- (d) Joint debtors, one or more non-residents.

III. (1. What may be attached?
- (a) personalty?
- (b) real estate?

2. Who may be made garnishees?

IV. What proceedings?—(Credit 1 Br. Pr. sec. 105, *pro tanto*.)

A. By plaintiff—
Prepare praecipe.
Approval of Sureties.
See writ properly endorsed.
Instructions to Sheriff.

Bond of indemnity.
Prepare affidavit of cause of action.
(Incidental—sale of chargeable of perishable personalty.)
If no appearance by defendant take judgment at third term after execution of writ; having *filed statement*, (15 days prior; and within one year after service of writ).
Assess damages—Rule on Prothonotary to assess.
Issue Sci. Fa. v. garnishee—when?
(Phila. rule of court.)
File interrogatories—Rule on garnishee to answer.
Serve copy on garnishee, with notice of rule—Is Sci. Fa. necessary if garnishee has entered an appearance?
If no answer filed, what?
If insufficient answers, what?
Order on list. Prepare Paper book.
If answers admit liability, what rule?
If answers sufficient, what rule?
If judgment v. garnishee, what?
If defendant *appear* how does the cause proceed?

B. On part of *defendant*.

To quash—(evidence not part of record.)
Rule on plaintiff to show cause of action and why attachment should not be dissolved. (But is this an appearance of defendant?)
Defendant may appear and defend.
" " " " " and may give bail to dissolve attachment.
If he appear, may he be required to file affidavit of defense? How does the suit proceed? A *supra*, plaintiff's steps; under B defendant's defenses.

C. On part of garnishee.

To quash—(Evidence not part of record.)
Rule on plff. to show cause of action, etc.
(Right under Phila. C. P. Rule 20—to require plff. to issue Sci. Fa. within 3 mos. after judgment against deft.) (Right to require plff. to file interrogatories.) Practice after answer filed.
Right to counsel fee.
What duty, if any, to non-resident deft.?
Forms of judgment against garnishee.

Observe:

Effect and lien of attachment. What is the order of priority?
Security to restore.
Sci. Fa. ad disprobandum debitum.

It is hoped that the attempt in these pages to give an outline of foreign attachment in Pennsylvania, from statutes and decisions and in procedure, may be of use to some of those recently admitted to practice, as well as to students at law.

John W. Patton.

NOTE.—The foregoing article has been drafted in undue haste in response to the courteous urgency of the President Editor, to take the place in this number of the Review, of an essay which unavoidably has been delayed. There has been scant chance to follow the *saepe stilum vertas*, etc., of Horace, or for any needed revision. Yet here it is—such as it is—on the specified date. In the yachtman's words, "time allowance" for the homely craft is requested.

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NOTES.

CONSTITUTIONALITY OF STATUTES REQUIRING CORPORATIONS TO PAY EMPLOYES' WAGES IN MONEY.

The so-called "Store Order," or "Truck" System means the payment of wages otherwise than in lawful money. As all exchange springs primarily from barter, or the exchange of one commodity for another, independent of any circulating monetary medium, theoretically there would seem to be no economic objection to an employer's giving goods rather than money in return for an employee's services.[1] Practically, however, the great economic advantage possessed by the large labor-employing agents over their employees may result in forcing the em-

[1] See *Fraier* v. *People*, 141 Ill. 171 at p. — (1892.)

ployee to asquiesce in whatever terms of employment the employer may dictate, in order that the necessary means of subsistence may be procured, and in compelling the employee to take in payment for his services goods of an inferior quality at a high price. The system may also have the effect of limiting the variety of commodities which the employee might enjoy to those supplied by the "Company Store," since it may cut off his only source of money with which to purchase in the markets of the world such articles as his desires or necessities may prompt him to acquire.

It is to this objectionable phase of the system that hostile legislation has been directed, and that the situation is not a new one may be observed from the fact that as early as 1464 the English Parliament attempted to cope with it.[2] Many other acts were passed in the three and a half centuries following the 4 Edward IV,[3] and finally these miscellaneous statutes were repealed and their provisions embraced and re-enacted in a statute passed at the beginning of the reign of William IV, which prohibited miners of coal, salt, etc., and manufacturers of iron, etc., from paying their employees in anything but lawful money of the realm.[4]

The system has also flourished in the United States, and its alleged abuses have, as in England, called forth inimical legislation. But while in England the transcendent power of parliament has given efficacy to this legislation, in this country its effect has been modified by the constitutional restrictions of a state's power to abridge personal rights and liberty of contract contained in the Fourteenth Amendment of the Constitution of the United States. These restrictions have resulted in a contrariety of judicial opinion in the construction of similar statutes.

Indiana has sustained an act requiring mine owners to pay employees every two weeks, and declaring unlawful every contract by which the right to receive wages otherwise than in money was waived, the legislature having power thus to enact in order to protect and maintain the lawful money of the realm.[5] West Virginia has sustained an act requiring mining

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[2] 4 Edw. IV., C. 1 (1464); cited in *State* v. *Coal Co.*, 36 W. Va. 802, at p. 833 (1892), and in *State* v. *Loomis*, 115 Mo. 307, at p. 325 (1893).

[3] Acts enumerated in *State* v. *Coal Co.* 36 W. Va. 802, at p. 833 (*supra*).

[4] Truck Act, 1 and 2 Wm. IV, CC. 36, 37; 22 St. at Large, 484, 490 (1830-31); cited in *State* v. *Coal Co.* 36 W. Va. 802, at p. 832 (*supra*).

[5] *Hancock* v. *Yaden*, 121 Ind. 366 (1889).

and other corporations to pay employees in lawful money only, on the ground that corporations are licensees of the state, possessing peculiar privileges, and hence, subject to general supervision and regulation by the sovereign power;[6] but in two earlier cases the same state court declared invalid a statute which prohibited manufacturing and mining companies from selling goods to employees at a greater per cent. profit than to others,[7] and which prohibited payment in store orders and the like,[8] on the ground that such legislation was an unwarrantable interference with the liberty to contract and that it was class legislation. Tennessee sustained a store order act applying to mining companies, and its action has been affirmed by the United States Supreme Court, holding it to be a valid exercise of the police power, regardless of the reserve power to alter, amend or repeal the charter of a corporation.[9] A case recently decided by the Supreme Court of Vermont[10] sustains a statute providing for payment of wages in money only, under the reserve power, but intimates that exclusive of this power such legislation would be sustainable as a valid police regulation.

On the other hand, Pennsylvania flatly refuses to accept this doctrine, and holds that an act requiring mining and manufacturing companies to pay employees in money only, is unconstitutional and void as an attempt to prevent persons who are *sui juris* from making their own contracts.[11] Illinois takes the same stand on the ground that such legislation exceeds the scope of the state's police power, and that an adult could not be denied the right to make a contract in respect to labor and property under the guise of giving him protection.[12] Colorado is in accord with this view, on the ground of interference with the freedom of contract.[13] and Missouri also, because the act in question was held not to apply to a business affected with a public use and because of unreasonable classification.[14]

The Vermont case[15] sums up the law exhaustively, and the

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[6] *State* v. *Coal Co.*, 36 W. Va. 802 (*supra*).

[7] *State* v. *Coal Co.*, 33 W. Va. 188 (1889).

[8] *State* v. *Goodwill*, 33 W. Va., 179 (1889).

[9] *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13 (1901).

[10] *Lawrence* v. *Rutland R. R. Co.*, 67 Atl. Rep. (Vt.) 1091 (Nov. 16, 1907).

[11] *Godcharles* v. *Wigeman*, 113 Pa. St. 431 (1886).

[12] *Frazier* v. *People*, 141 Ill. 171 (*supra*).

[13] *In re* House Bill No. 203, 21 Colo. 27 (1895).

[14] *State* v. *Loomis*, 115 Mo. 307 (*supra*).

[15] *Lawrence* v. *Rutland R. R. Co.* 67 Atl. Rep. (Vt.) 1091 (*supra*).

statute involved is held not to be a deprivation of liberty or property without due process of law; nor a denial of the equal protection of the laws; nor an invalid classification as to companies properly included, because others may be improperly included; nor an unlawful interference with the employee's liberty to contract, inasmuch as it operates on him but indirectly, while the direct restriction upon the employer's right is unobjectionable.

Equitable Jurisdiction to Restrain Legal Proceedings under Alleged Unconstitutional Statute.

The jurisdiction of equity to restrain proceedings at law to collect penalties imposed by an alleged unconstitutional statute —when the constitutionality of the statute could be determined in a suit at law—was recognized in the recent case of *Consolidated Gas Co.* v. *City of New York* (Circuit Ct. of U. S. for South. Dist. of N. Y., opinion filed Dec. 20, 1907). In so holding, the decision is in accord with the majority view.[1] This view rests upon the jurisdiction of equity to prevent a multiplicity of suits.

In general, there are two classes of cases in which equity takes jurisdiction to prevent a multiplicity of suits: (1) where a single plaintiff or defendant in order to secure redress must bring or defend a number of suits; (2) where a number of plaintiffs or defendants are parties to a litigation which presents but one issue of law or fact. According to the majority view above-mentioned, the first class is further divided into cases (a) where a suit at law will not finally determine the rights of the parties, as in ejectment and nuisance, and (b) where a suit at law does determine the rights of the parties, but where a multitude of suits may arise before any single suit is determined.[2] In the first sub-division equity will not interfere until the plaintiff's right has been established at law, and this, because the multiplicity of suits does not generally arise until *after* the plaintiff's right has so been established; in the second, however, it is not requisite that the plaintiff's right should first have been established at law, since the multiplicity of suits here arises *before* his right has been established. The minority view has ignored the second sub-division, and has

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[1] City of Beckham, 118 Fed. Rep. 339; *Schlitz Brewing Co.* v. *City*, 117 Wisc., 297; *Sylvester* v. *Lewis*, 130 Mo. 323; *Davis* v. *Fleming*, 128 Ind. 271.

[2] Pomeroy's Eq. Jurisp. Sec. 254.

therefore announced the doctrine that as between two parties equity will not interfere to prevent a multiplicity of suits, until the plaintiff has established his right at law.[3] Such a result, it is submitted, violates a principle of the equitable doctrine regarding multiplicity of suits and arbitrarily denies relief to a suitor whose equity is as strong as in any instance falling within this field of equity jurisdiction.

Another and broader ground suggested for the interposition of equity in this class of cases is the prevention of irreparable injury, and if this be recognized, then the suitor might obtain relief even in those jurisdictions which deny a remedy under the doctrine regarding multiplicity of suits.[4] In a similar class of cases, *i. e.*, those involving the jurisdiction of equity to enjoin proceedings at law under an invalid tax ordinance, the courts have acted not only upon the ground of preventing a multiplicity of suits, but also of preventing irreparable injury,[5] *e. g.*, where the tax is collected by the state, against whom no legal proceedings could be maintained. If this analogy is to prevail in the class of cases under consideration, the question remains as to what constitutes such an irreparable injury. In general, such an injury would seem to be any substantial interference with the plaintiff's business, as where the statute provided for the arrest of the plaintiff's agents, for the seizure of property, or where, as in the case of a public service corporation, disturbances on the part of the public might result from the plaintiff's attempted exercise of his alleged legal rights.[6] If, as in the recent case under discussion, the statute merely provides for the collection of a penalty, the question as to whether there would exist the danger of irreparable injury is more difficult, although there is some authority to the effect that this would be sufficient to give equity jurisdiction.[7] Since, however, the defense of the unconstitutionality of the statute could be interposed in the suit brought at law to recover the penalty, it is difficult to see why the refusal of equity to assume jurisdiction would submit the plaintiff to irreparable injury.

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[3] *West* v. *Mayor*, 10 Paige, (N. Y.) 539. This case is the basis of the minority view. *Ewing* v. *Webster*, 103 Iowa 226; *Poyer* v. *Village*, 123 Ill. 111.

[4] *Ewing* v. *Webster City*, 103 Iowa 226, where the court after denying jurisdiction to prevent a multiplicity of suits took up the question of irreparable injury; it was decided that such injury did not exist in that case.

[5] *Dows* v. *City*, 11 Wall. 108.

[6] *Milwaukee Ry.* v. *Bradley*, 108 Wisc. 467.

[7] *Schlitz Brewing Co.* v. *City*, 117 Wisc. 297; cf. *Chicago Ry.* v. *Dey*, 35 Fed. Rep., 866, at p. 882.

EQUITY PLEADING: THE MANNER OF OBJECTING TO A BILL FOR DISCOVERY OBJECTIONABLE ON ITS FACE.

In the United States, constitutional provisions as a rule protect against self-incrimination.[1] The provisions of the various constitutions were, however, nothing more than enactments of the chancery rules as they existed in England at the time of their adoption. For more than two centuries at least it has been the admitted rule of the English courts that no witness could be compelled to give discovery in equity if the tendency of such discovery would be to incriminate himself.[2] This general proposition has never been doubted, and it would certainly seem to make no difference in the rule that the civil suit was based on facts, which also would give rise to a criminal liability as well, and so it has been generally held.[3] In the light of this rule the recent case of *National Association of Operative Plasterers* v. *Smithies*[4] might seem an anomaly. The point of the decision is, however, the manner in which, under the present English practice, objection against incriminating discovery should be formally made. The case was a civil action for damages for a conspiracy to induce workmen to break their contracts with the plaintiff. The plaintiff called on the defendant to produce certain documents relating to the conspiracy which the defendant refused to do on the ground that they contained matters which would tend to incriminate him by making him subject to a criminal action for conspiracy. The master made the usual order for relevant documents under the English practice. It would seem that the objection of the defendant to producing the documents was not made upon oath. The court overruled the defendant's objection to complying with the master's order and compelled the production of the documents. The opinions of the various judges are brief and unsatisfactory to one unfamiliar with the English practice

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[1] Fifth Amendment to the Constitution of the United States; Article I, Sec 9, of the Constitution of Pennsylvania, both of which have been interpreted to apply to testimony in civil as well as criminal actions.

[2] *Oliver* v. *Haywood*, 1 Hust. 82; *Claridge* v. *Hoare*, 14 Ves. 59; Mitford's Equity Pleadings by Jeremy, 194; Story's Equity Pleadings (5th Ed.) Sec. 575-98; Bispham's Principles of Equity (7th Ed.) Sec. 562.

[3] *Chambers* v. *Thompson*, 4 Bro. Ch. 434 (1793); *Thorpe* v *Macauley*, 5 Madd. 218, 229 (1820); *Glynn* v. *Houston*, 1 Keen Ch. 329 (1836); *Marsh* v. *Davison*, 9 Paige (N. Y.) 580 (1842); Story's Equity Pleadings (5th Ed.) Sec. 597.

[4] L. R. 1906 A. C. 434.

and seem to show that the basis of the decision of the court was that the objection was not taken under oath.[6]

The court in its decision relies mainly on the cases of *Allhusen* v. *Labouchere*[8] and *Spokes* v. *Grosvenor Hotel Co.*[7] In the former[8]—quoted from in both the subsequent cases[9]—James, L. J., said, "Nobody was ever allowed to object to a relevant question because that question tended to incriminate himself. He might object to answer it, but it was never a ground of demurrer to an interrogatory, or a ground for striking it out, that the answer might involve him in a crime." It is submitted that this statement largely relied on for the decision in the main case[10] is essentially untrue. Under the old chancery practice a demurrer was always a proper mode to object to a bill like that in *Allhusen* v. *Labouchere*[8] where the objection was apparent on the face of the bill.[11] That the objection was so apparent in the main case[10] is evident since the facts alleged gave rise to both a civil and criminal action for conspiracy, hence, any material relevant to the plaintiff's case in the civil action would also be relevant in a criminal action against the defendant. Indeed, it has been several times held in England that the court will strike out interrogatories objectionable on their face though the defendant specifically refused to answer them under oath.[12] These latter cases, which are on their facts exactly in point, would seem to control the case in hand. The court in its decision cites no statute, though a statute or positive rule of court would of course control the decision, and evidently relies on what it considers to have been the practice in the old court of chancery—its interpretation of which, it is submitted, is far from accurate.

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[6] Lord Macnaghten on 437 quoting from *Allhusen* v. *Labouchere* (*infra*) says: "But then he must take the objection on his oath, and if he does raise that objection on his oath in the proper way he is not bound to answer the interrogatory."

[7] L. R. 3 Q. B. D. 654 (1878).

[8] (1897) 2 Q. B. 124.

[8] *Allhusen* v. *Labouchere*, L. R. 3 Q. B. D. at 660.

[9] *Spokes* v. *Hotel Co.* (*supra*); *National Association of Plasterers* v. *Smithies* (*supra*).

[10] *National Association of Plasterers* v. *Smithies* (*supra*).

[11] *Chambers* v. *Thompson* (*supra*); Kent. Ch. in *Sharp* v. *Sharp*, 3 John. Ch. (N. Y.), 407 (1818); *Glynn* v. *Houston* (*supra*); *Marsh* v. *Davison* (*supra*); *N. W. Bank* v. *Nelson*, 1 Gratt. (Va.) 108 (1844); Bray on Discovery (1885) 318.

[12] *Hill* v. *Campbell*, L. R. 10, C. P. 222 (1875); *Atherley* v. *Harvey*, L. R. 2, Q. B. D. 524 (1877); *Tupling* v. *Ward*, 6 H. & N. 749 (1861); cf. also Hare on Discovery 149 (1849).

Liability of Agent in Tort for Breach of Fiduciary Duty.

Among the obligations of an agent to his principal, are the duties, (1) to obey instructions, (2) to exercise care and skill, and (3) at all times to act in good faith and be loyal to his principal. A breach of any of those duties is a tort, and the principal can recover for any proximate damage. It is well established that an agent must obey to the letter all instructions of his principal, unless the act commanded is illegal or immoral, or unless obedience is prevented by unavoidable necessity. It is no defense to a non-performance or to a deviation that he exercised reasonable care and skill in the course pursued, and acted in good faith, thinking he was doing that which was best for the interests of his principal. He has no discretion in the matter, and adopts a contrary course at his own risk. Accordingly, where an agent, thinking that the price was about to drop, did not follow his instructions to buy, he was compelled to make good for the loss sustained by the subsequent rise.[1]

It is also well established that in executing his instructions, and in discharging the duties of his agency, it is his duty to exercise a reasonable degree of skill and care, such as is reasonably demanded by the nature and circumstances of the transaction. He is presumed to warrant that he possesses such a degree of skill. If the principal knows of the deficiency, the presumption is rebutted.[2] The agent does not undertake an absolute liability. He is not liable for loss due to his mistake of law or fact. Accordingly, where an agent is instructed to loan money, he is liable if he shows such a lack of skill or care as to loan upon worthless or imprudent securities.[3]

But illustrations of holding an agent liable in tort for a breach of the third class of duties are not so numerous. This principle is well established that it is the duty of an agent at all times to act with the best of good faith in the furtherance of his principal's business. The relation is called a fiduciary one. This principal relies upon the fidelity and intergrity of the agent; and the latter should act with the single purpose of advancing his principal's interest, and should never take any position which is antagonistic to those interests, or use his position and authority for his own private gain. Generally this breach of the duty affords a remedy in equity, where the

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[1] *Heineman* v. *Heard*, 50 N. Y. 27 (1872).

[2] *Pelt* v. *School Dis.*, 24 Vt. 297.

[3] *Whitney* v. *Martine*, 88 N. Y. 535.

agent has represented two principals, or where he acted both for himself and his principal—*e. g.*, where, being ordered to sell, he became the purchaser—a bill in equity is brought to rescind. Where the agent has misused his position for his own private profit, equity makes him a constructive trustee. Yet there are cases when the agent has received no profit, and where there is no contract to set aside; but because of a breach of his fiduciary duty, a loss has occurred to his principal. It is well settled that such a breach of a fiduciary duty is a tort. Accordingly, where an agent, with authority to lend, loaned money to an irresponsible person, in an enterprise in which he was interested, he was compelled to make good the loss.[4] In a recent case, an agent disregarded instructions to renew a lease, and instead got others to try to obtain it for his own profit; the principal was compelled to renew the lease at a higher rental, and recovered from the agent. *Acker, Merrall & Condit Co.* v. *McGaw*, 68 Atl. (Md.) 17 (1907). In another case, a chairman of a commission, authorized to buy land, gave information as to proposed purchases to a third person, who bought up the land. The chairman was made liable.[5] These cases are perfectly sound. They generally state that a breach of a fiduciary duty is a tort. Of course, if this is intended to cover breaches of duty on the part of an express trustee, it is inaccurate. Such cases are, however, of interest in causing the query whether there has been or is likely to be a tendency in courts of law to recognize and compensate for the breach of duties which may at one time have been recognized by courts of equity alone.

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[4] *First Nat. Bank of Sturgis* v. *Reed*, 36 Mich., 263 (1877).

[5] *City of Boston* v. *Simmons*, 150 Mass. 461, 1890. Also *Hegenmeyer* v. *Marks*, 37 Minn. 6 (1887); *Talbot* v. *Scripps*, 31 Mich. 268.

RECENT CASES.

ACCORD AND SATISFACTION.

An agreement to accept less than the liquidated amount of a debt in discharge thereof will operate as a good accord and satisfaction if actually executed by payment of agreed amount. *Phinsy* v. *Bush*, 59 S. E. Rep. 259. Sup. Ct. of Ga. This decision is based upon a Georgia statute, Civil Code (1895), sec. 3735, and is directly contra to the common law rule of *Foakes* v. *Beer*, 9 App. Cas. 605.

State Statutes Changing Common Law Rule of Foakes vs. Beer

The following states have also abolished the common law rule by statute:

Alabama—Ala. Code (1876), sec. 2774;
California—Civil Code (1894), sec. 1524;
Maine—Rev. St., Ch. 82 sec. 45;
North Carolina—Code, sec. 574;
North Dakota—Rev. Code, sec. 3827;
Oregon—Hills Amer. Laws, sec. 755;
South Dakota—Comp. Laws, sec. 3486;
Tennessee—Code (1884), sec. 4539;
Virginia—Code (1897), sec. 2858;

Mississippi abolished the rule by decisions without statute —*Clayton* v. *Clark*, 74 Miss. 499. By decision, also, in some states a parol debt may be satisfied if the creditor gives a receipt in full for a partial payment—*Green* v. *Langdon*, 28 Mich. 221; *Lemprey* v. *Lemprey*, 29 Minn. 151; *Gray* v. *Barton*, 55 N. Y. 68; *Ferry* v. *Stephens*, 66 N. Y. 321.

AGENCY.

A lessee's agent with instructions to renew the lease of his principal, renewed it for himself at the old rental. He finally assigned the lease to his principal, but the landlord refused to consent. This agent procured others to try to obtain the lease for him. Due to their high offer, the principal was finally compelled to pay an additional thousand dollars rental in order to procure the lease for himself. *Held*, The agent was

Failure to Renew Lease: Tort: Breach of Fiduciary Duty

CONFLICT OF LAWS.

liable in tort for the loss sustained by the principal—See note, page.

A, in Tennessee, sent a telegram to B, in Arkansas, to call B to the funeral of a near relation. The telegram was lost in transit before it reached the state of Arkansas. B sued the telegraph company in Arkansas to recover damages for "mental anguish." *Held*, though he could not recover under the Arkansas statute, which gives a cause of action to the addressee when the negligence is shown to have occurred within the state, yet he could recover under the decision of the courts of Tennessee, which permit the addressee of a telegram to sue on the contract of the sender, to recover for mental anguish. Supreme Court of Arkansas, in *W. U. T. Co.* v. *Woodward*, 105 S. W., 578.

Telegraph Company: Failure to Deliver Message

In determining what law governs, the ultimate criterion is the intention of the parties, expressed or implied (II Wharton, Conflict of Laws, 1056, 3d ed.). When the addresse of a telegram recovers on the theory that the contract was made for his benefit, it might be said that the parties must have intended that the law of the place of delivery should apply. It was so held in *Howard* v. *Tel. Co.*, 84 S. W., 764 (Ky.); but on the ground that the negligence occurred entirely in Kentucky. But if the recovery is on the contract, it would seem that the place where the negligent act occurred is of no importance in determining what law shall apply. See *Tel. Co.* v. *Cooper*, 29 Tex. Civ. App., 591.

CONSTITUTIONAL LAW.

The State Legislature of Texas enacted that the Comptroller of Public Accounts shall issue a permit to apply to the county judge of the proper county for a liquor license; that the applicant must show, among other things, (1) that he is a law-abiding, tax-paying, male citizen of the state of Texas, and (2) that he has been a resident of the county wherein such license is sought more than two years next before the filing of such petition. A, a resident of Arkansas, seeks a mandamus to compel B., the comptroller, to issue to him such a permit, alleging that the above require-

Police Regulation: Liquor License

CONSTITUTIONAL LAW (Continued).

ments are unconstitutional under Art. 4, Sec. 2, and Art. 14, Sec. 1 of the Federal Constitution. *Held,* (1) that the regulation of the liquor traffic is within the police powers of the state with which the above sections were not designed to interfere, and (2) that this discrimination against non-residents was not a mere guise for discrimination, or without good reason. For it is reasonable that they should be residents of the county, so as to be within the jurisdiction at all times for the enforcement of the law, and to enable the character of the applicant to become known in case of impeachment if it be necessary. *De Grasier* v. *Stephens,* 105 S. W., 992.

A similar case arose in Missouri, in 1843, under Art. 4, Sec. 2, and was then held to be constitutional in *Austin* v. *State,* 10 Mo., 591.

Liquor dealers, saloon-keepers, hawkers, peddlers, theaters, shows, billiard-table keepers, gamblers, brewers, etc., are within the class subject to such police power. *Territory* v. *Connell,* 16 Pac. (Ariz.), 209. So, also, are laundries and professions. *Barbier* v. *Connolly,* 113 Fed., 31. However, where such exercise of the police power works a discrimination against the products of another state, as in the "Dispensary Law" of South Carolina, prohibiting a citizen from buying liquor in another state for his own use in his own state, the act is unconstitutional. *Donald* v. *Scott,* 67 Fed., 857.

The statute providing such regulation may not give to the person whose duty it is to enforce the act an unrestrained will or discretion, but there must be fixed rules by which impartial execution may be secured. *Yick Wo* v. *Hopkins,* 118 U. S., 373.

Municipal Ordinance; Right to Restrain Passage

By ordinance duly enacted under the legislative powers conferred by the legislature, B granted to A the street railway franchise, upon certain conditions. A fulfilled the conditions and put the line into operation at a cost of $75,000. Thereupon B proceeded to pass another ordinance, within its legislative power, repealing the first ordinance. A brings a bill to restrain the mayor and council from passing the ordinance, on the ground that it will impair the obligations of his contract and deprive him of his property without due process of law. *Held,* that though the ordinance would be unconstitutional,

CONSTITUTIONAL LAW (Continued).

equity cannot restrain its passage, because the act involves legislative discretion which is within the sovereign power and protection of the legislative branch of the government. *Missouri* v. *Olathe*, 156 Fed., 624.

That equity cannot restrain the passage of an ordinance, was similarly held in *Alpers* v. *City*, 32 Fed., 503, or the fixing of rates by a commission duly authorized, in *McChord* v. *Railroad*, 183 U. S. 483.

But where irreparable injury would result, equity will restrain the passage of an ordinance if it is *ultra vires* (*Spring Valley*, v. *Bartlett*, 16 Fed., 615), or if the statute authorizing the passage is unconstitutional (*Vicksburg Water Works* v. *Vicksburg*, 185 U. S., 67).

Statute Requiring Payment of Wages in Money

In *Lawrence* v. *Rutland Railroad Company*, 67 Atl. Rep., 1091 (Nov. 16, 1907), the Supreme Court of Vermont sustains the validity of a Vermont statute which provides that a mining, quarrying, manufacturing, mercantile, telegraph, telephone, railroad, or other transportation corporation, and an incorporated express, water, electric light or power company, transacting business in that state, shall pay its employees each week, in lawful money, and prohibiting payment in store orders or other script, forbidding assignments of future wages to such company, or to anyone in its behalf, and prohibiting such a company from exacting from its employees, as a condition of employment, an agreement to accept wages at any other time; and holds that under the reserve power to alter, amend or repeal, the statute (1) is not a deprivation of liberty or property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States; (2) that it is not a denial of the equal protection of the laws, its classification being a reasonable one; (3) that its classification is not void because it includes certain corporations improperly, nor because it operates on foreign corporations as well as domestic but that it is valid as to those properly included, regardless of its effect upon those improperly included; and (4) that it does not infringe the employee's right to contract, the restriction not being direct, but resulting indirectly from the restriction of the employer's right, the restriction being valid as to the employer. See note, p.

CONTRACTS.

Options: Consideration of One Dollar

In consideration of one dollar in hand paid, B agreed in writing to convey to A certain interests in land upon the payment of the agreed price within twelve months. Within the agreed time, B conveyed the said rights to C. A sues B and C for damages for the loss of the contract, alleging conspiracy.

Held, the agreement was without sufficient consideration and B, by the sale to C, withdrew the offer. *Noble* v. *Mann*, 105 S. W. (Ky.), 152.

This decision is the result of the theories of mutuality and sufficient consideration prevailing in Kentucky. This doctrine of mutuality of obligation and liability is the old theory put forth by Lord Redesdale in *Lawrence* v. *Butler*, 1 Schoales & Lefroy, 19; and by Chancellor Kent in the *dicta* of *Parkhurst* v. *Cortland*, 1 Johns. Ch., 282, and *Benedict* v. *Lynch*, Ibid, 370. England rejected the doctrine in *Hatton* v. *Gray*, 3 Ch. Cas., 164. Kent repudiated it in *Classon* v. *Bailey*, 14 Johns. R., 484. New Jersey adhered to it in *Smith* v. *McVeigh*, 3 Stockton, 239, but repudiated it in *Hawralty* v. *Warren*, 18 N. J. Eq., 126. Kentucky adopted it upon the reasoning of Lord Redesdale, in *Baucher v. Vanbuskirk*, 2 A. K. Marshall, 723, and has adhered to it rather strictly down to the case of *Bacon* v. *Kentucky Railroad*, 95 Ky., 376.

To give this mutuality, Kentucky holds that the consideration for the option must be both good and sufficient. A consideration of one dollar is held not sufficient, even though under seal. *Thompson* v. *Reid*, 101 S. W. (Ky.), 964.; *Letz* v. *Gosling*, 93 Ky., 185. Nor will a sufficient consideration be implied in a covenant of lease (*Baucher* v. *Vanbuskirk, supra*), but must be found sufficient in fact. *Bacon* v. *Kentucky Railroad, supra; Bank* v. *Baumeister*, 87 Ky., 11.

These doctrines of consideration and mutuality are *contra* to those generally held in all other jurisdictions, for which see *Hawralty* v. *Warren*, 18 N. J. Eq., 126, and *Adams* v. *Peabody*, 82 N. E. (Ill.), 645, and the cases therein cited.

DISCOVERY.

Exhuming Dead Body

In a suit on an insurance policy which contained a clause preventing recovery in event of death by suicide, it appeared that the insured met his death by falling from the roof of his house. But the circumstances accompanying the accident were highly suspicious, pointing to a deliberate suicide. He had purchased morphine on

DISCOVERY (Continued).

the day of his death and his eyes showed the effect of morphine poisoning. He had, however, been buried without any examination having been made on the part of the insurance companies. The court granted an order permitting the insurance company to exhume the body for examination. *Mutual Life Insurance Co. of New York* v. *Griess*, 156 Fed., 398. See note, page

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FRAUD.

Liability for False Prospectus: Intent

Defendant bank, after having been informed by the Comptroller of the Currency that certain of its assets were doubtful, without any examination of said assets issued a prospectus containing them. After a great part of the doubtful assets had been declared valueless by the Comptroller, plaintiff, having, in reliance upon the prospectus, purchased shares of the bank's stock, brought the present action to recover the price paid for the shares. *Held*, that this report was put out with the intent that it should be published for the information of the public, and for all who would have dealings with the bank and in its stock; and being either actual recklessness of results, or a wilful refusal to make the examination, the defendant was liable. *Taylor* v. *Thomas*, 106 N. Y. Sup., 538. It has been held that where a corporation makes a false representation, for a purpose other than to induce anyone to buy shares, one who buys shares on the faith of the representation has no action against the corporation. *Hunnewell* v *Duxbury*, 154 Mass., 286. Where the directors of a company issue a false prospectus with the intent of inducing the public to buy shares, and one relying on the prospectus buys shares from an original allottee, he has no action against the directors, because there was no intent that the plaintiff should act on it. *Peek* v. *Gurney, L. R.*, 6 *H. L.*, 403. Since the report in the principal case was merely to create a false impression in the business world in order to avert the ruin of the bank, and not to induce the plaintiff to buy shares, there would seem to be here a step in advance. That it is better to hold a man to a strict account for his words and liable to whoever acts on them, whether intended for him or not, is hardly questionable.

JEOPARDY.

After a jury had been sworn and testimony given, a juror was reminded of an occurrence in his father's family years ago, which rendered him biased and unqualified to render an impartial verdict. The jury was thereupon discharged and another impaneled and sworn. The defendant set up his constitutional right against being twice put in jeopardy for the same offence. His plea was overruled. *State* v. *Hansford*, 92 Pac. Rep., 551 (Kansas).

What Constitutes Being put in Jeopardy of Life and Limb

There is a division of authority as to when jeopardy exists. Some jurisdictions hold that one has never been placed in jeopardy until a valid verdict has been returned. *State* v. *Elden*, 41 Me., 165; *People* v. *Meakim*, 61 Hun, 327. The weight of authority, both in numbers and reasoning, holds that when a man is brought face to face with a full jury, duly sworn, he is placed in jeopardy. *United States* v. *Van Vleet*, 23 Fed. Rep., 35; *Alexander* v. *Comm.*, 105 Pa., 1. The difficulty which arises from the latter position is exemplified in cases like the present. Bishop (Crim. Law, Vol. I, Sec. 867-869) reconciles them with the principle by saying that the occurrence which interrupted the trial was certain, though unforeseen, at the time the jury was sworn; so that upon its happening, the whole proceeding was vitiated and jeopardy never existed.

PERPETUITIES.

Testator devised certain premises in equal parts to his two sons, on the trust that the part devised to each should be held for his benefit, without power of sale, for life, and he appointed his two sons trustees of the property devised for their own use. *Held*, No trustee having been appointed to hold the legal title during the time the testator's sons should have the beneficial interest, the effect of the devise was to vest in testator's sons a life estate, and the attempt to deprive them of the power of alienation was repugnant to the estate and void. *Street* v. *Fay*, 82 N. E. Rep., 648 (Sup. Ct., Ill.).

Suspension of Absolute Power of Alienation: Life Estate

In a devise of land in fee simple, a condition against alienation is void, because it is repugnant to the estate devised. *Potter* v. *Crouch*, 141 U. S., 315; Keppele's Appeal, 53 Pa. St., 211. There is some conflict in the decisions as to whether the same rule applies to life estates. *Nichols* v. *Eaton*, 91 U. S.,

PERPETUITIES (Continued).

716. "But where an estate is made to vest without condition—any restriction on the power of alienation is repugnant to the estate devised to the first taker, be it a life estate or a fee simple." *Bank* v. *Davis*, 21 Pick., 42; *Fleming* v. *Harrison*, 76 Ky., 723. "No principle of public policy, or of *stare decisis* establishes the rule that the testator may, without the intervention of a trustee, vest an estate in fee, or for life, with a restriction thereon repugnant to an estate and preventing alienation of the same." *Henderson* v. *Harness*, 176 Ill., 302.

STREET RAILROADS.

Crossing Track: Contributory Negligence

The plaintiff saw an approaching car of the defendant as he was about to cross the latter's tracks. He urged his horse forward, but owing to the excessive speed at which the defendant's car was traveling, a collision occurred before he could clear the tracks. It was held that the plaintiff was not guilty of contributory negligence; nor was he bound to anticipate the unreasonable use of the highway by the defendant. *Indianapolis St. Ry. Co.* v. *Hoffman* (Ind), 82 N. E. Rep., 543.

In *Callahan* v. *Phila. Tract. Co.*, 184 Pa., 425, the principle of the present case was followed, but by later decisions it has in effect been overruled in Pennsylvania (*Keenan* v. *Traction Co.*, 202 Pa., 107), so that the doctrine of the latter state stands in marked contrast with the principal case. In a case practically similar to the one under discussion, binding instructions were given for the defendant. *Timler* v. *Transit Co.*, 214 Pa., 475. This is a direct outgrowth of the Pennsylvania doctrine, which has, by an unbroken line of decisions, held that non-compliance with the injunctions of the "stop, look and listen" signs at steam railway crossings is negligence, *per se*. *Pa. R. R.* v. *Beal*, 73 Pa., 504. The application of this presumption of law to street railways to the extent of holding it contributory negligence in not looking in both directions immediately before crossing the track, seems to disregard the fundamental difference between the roadbed rights of the two carriers.

The principal case represents the general law on this question. *Cincinnati St. R. Co.* v. *Whitcomb*, 66 Fed., 915; *Weiser* v. *Broaway St. R.*, 10 Ohio, 14.

WILLS—LEGACIES.

Parol Evidence of Intent to Charge on Land

A testator bequeathed pecuniary legacies to various persons, but died intestate as to his realty. It was offered to show by parol evidence that his personal property was insufficient to pay the legacies after satisfying his debts, and that he intended to make such legacies a charge on the realty. *Held*, the evidence was inadmissible. *Fries* v. *Osborne*, 82 N. E. 716 (Ct. of App., N. Y.).

Parol evidence is not admissible to show the intention of the testator as to the disposition of income of a specific legacy before payment of the legacy, where the will is silent in regard thereto. *Loring* v. *Woodward*, 41 N. H., 391; *Goulder* v. *Chandler*, 87 Mo., 63. The intention of the testator cannot be gathered wholly from facts *dehors* the will. *Judy* v. *Williams*, 2 Ind., 449.

BOOK REVIEWS

THE LAW AND CUSTOMS OF RIOT DUTY. By BYRON L. BARGAR. Published by the Author. 1908. Pp. 323.

Within a brief space the author has included not only a detailed statement of the law governing the conduct of those in charge of military forces during times of insurrection or riot, but also many valuable directions, based apparently upon his own experience, as to the actual management of militia in the field. From a legal standpoint, the book possesses the merit of containing an accurate statement in language, usually clear, but occasionally unnecessarily complicated, of the questions of law with which an officer in charge of troops on riot duty will be frequently confronted. For use by such persons the book will prove very valuable, but for the student or for the practitioner the book is of comparatively little importance, because it contains rather conclusions of law than an analysis of the legal principles involved. It should, however, be noted that the author does not claim that his little volume is a legal treatise, but rather that, as stated on the title page, it is a "guide for national guard officers and civil authorities." For this purpose the book is adequate and helpful. The carefully drawn distinctions between the powers and duties of those in charge of the military forces and the civil authorities whose responsibilities they frequently assume, is particularly to be commended. The forms included in the text of the book for proclaiming martial law and similar purposes are well drawn and can be used in many instances without further elaboration.

R. D. J.

THE POWER OF SPECIAL TAXATION. A CRITICAL ANALYSIS OF SPECIAL TAXES FOR LOCAL AND PUBLIC IMPROVEMENTS. By HENRY N. ESS. Kansas City, Missouri: Pipes-Reed Book Co. 1907. Pp. x, 389.

The object of this work is to demonstrate that the present system of taxation for local improvements, particularly as established in our western states in the form of contractors' tax bills, is unconstitutional. The conclusions of the author

are based primarily on certain decisions of the Supreme Court of Missouri. His chief grievance (for, from the querulous tone of the whole book that phrase is not improper), is that in some instances property has been assessed for local improvements, although at the same time damages have been awarded to the owner for the results of the same change of grade or other public work. See especially the case of *Smith* v. *Kansas City*, 128 Mo. 23, sustaining the legality of this result. On this decision Mr. Ess comments as follows (at page 289):

"This doctrine is the quintessence of malicious anarchy in its most hideous form. It betokens a return to savagery and barbarity. The most absolute and despotic government on earth never has done and never can do worse. The arch-fiends and devils of hell, with all their legendary tendencies to evil, cannot equal much less excel it!"

This quotation is fairly typical of the spirit in which the whole work is prepared. Such language does not carry conviction. This treatment is unfortunate, because the subject of the legality of the excessive assessments for local improvements is one of such importance, especially to non-resident investors, as to warrant a more exhaustive and a more judicial examination than is furnished in the present work.

R. D. J.

THEATRICAL LAW. THE LEGAL RIGHTS OF MANAGER, ARTIST, AUTHOR AND PUBLIC IN THEATERS, PLACES OF AMUSEMENT, PLAYS, PERFORMANCES, CONTRACTS AND REGULATIONS. By J. ALBERT BRACKETT, LL. B. Boston, Mass.: The C. M. Clark Publishing Co. 1907. Pp. xviii, 503.

The weakness and the strength of this book are discernible in its introduction and are easily traced through the whole.

"The decisions of the courts on matters pertaining to the stage, and all manner of amusements to which the public is admitted, are no distinct phase of the law, merely an application of established principles to those subjects."

This statement is so true that even opposing counsel could hardly take exception to it, but the attempt to write a text-book on the law of these subjects as though that were a distinct phase results necessarily in a congeries of kindergarten essays on such diverse departments of the law as copyright, negligence, contracts, landlord and tenant, damages, and equity jurisdiction, illustrated by theatrical precedents. To treat these subjects adequately would be to produce an encyclopædia, which this thin volume is not, and to treat them inadequately is small

help to the hurried attorney. The fact is that this book, though produced with all the trappings of the legal tone, is not for the lawyer. It might save him some labor over digests, but could hardly do more. Its habitat is not the bar, but the rialto.

Proceeding, the introduction points out the extreme importance of knowing what you are about when coming into relations fixed by contract or law.

"The careless individual who signs a contract without thought or advice, or assumes relations without knowing his responsibility therein, is most often the one who complains of lack of justice and unfairness in the courts."

To lighten the burden of such ignorance resting on the theatrical profession is the real mission and value of this work, and for this purpose it is admirably well done. It ought to find a place in the curriculum of every school of dramatic art and be possessed by every member of the profession not yet sufficiently advanced to retain his own lawyer.

S. B. S.

A SUPPLEMENT TO A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT THE COMMON LAW CONTAINING THE STATUTES AND JUDICIAL DECISIONS 1904-1907. By JOHN HENRY WIGMORE. Boston: Little, Brown & Co. 1908. Pp. xiii, 458.

This book, which appears as volume V of "Wigmore on Evidence," brings down that standard work to July 1, 1907. The earlier volumes have already been reviewed in these columns. The supplement contains but little addition to the text of the earlier volumes. The notes as to recent cases and statutes are concise and clear. A very commendable feature of the supplement is the excellent index, with its references not only to the sections in the current volume, but also to the four earlier ones. In the author's preface of the recent decisions there is a brief but suggestive analysis of his views as to the general tendencies shown in recent decisions to do away with the "Opinion Rule," to recognize a broader application of the doctrines of "New Trials for Erroneous Rulings" and to permit judges "to give instructions of law upon the effect of particular pieces of evidence."

R. D. J.

BOOKS RECEIVED.

(Under this heading will be noted a list of publications received for review each month. Reviews will be published as soon as possible and as nearly as possible in the order in which they are received. All books and communications in regard thereto should be addressed to the Book Review Editor, University of Pennsylvania Law Review, Thirty-fourth and Chestnut Streets, Philadelphia.)

GENERAL PRINCIPLES OF THE LAW OF TORTS. By *John C. Townes, LL. D.* Austin, Texas: Austin Printing Co. 1907.

A TREATISE ON EQUITY JURISPRUDENCE. By *John Norton Pomeroy.* Students' Edition. By *John Norton Pomeroy, Jr.* San Francisco: Bancroft-Whitney Co. 1907.

THE LAW OF CHECKS, NOTES AND BANKS. By *Thomas C. Simonton.* New York: Victor Van Horen. 1906.

A TREATISE ON THE LAW OF REPLEVIN. By *H. W. Wells.* Second Edition prepared by *Hon E. T. Wells.* Albany: Banks & Co. 1907.

THE LAW AND PRACTICE OF DIVORCE. By *G. L. Hardy.* London: Effingham Wilson. 1907.

THE LAW OF PERSONAL INJURIES. By *John L. Hopkins.* Atlanta: Foote & Davies Co. 1902.

A TREATISE ON SUITS IN CHANCERY. By *Henry R. Gibson, A. M., LL. D* Knoxville, Tenn.: Gant-Ogden Co. 1907.

PROBATE REPORTS, ANNOTATED. Volume XI. By *Wm. Lawrence Clark.* New York: Baker, Voorhis & Co. 1907.

TREATISE ON THE LAWS OF NATURALIZATION.. By *Frederick van Dyne, LL. M.* Rochester: Lawyers Co-operative Publishing Co. 1907.

A CODE OF FEDERAL PROCEDURE. By *Walter Malins Rose.* Three volumes. San Francisco: Bancroft-Whitney Co. 1907.

LAW, ITS ORIGIN, GROWTH AND FUNCTION. By *James Coolidge Carter, LL. D.* New York and London: G. P. Putman's Son. 1907.

NEW YORK EMPLOYERS' LIABILITY ACT. By *Messrs. Alger and Slater.* Second Edition by George W. Alger. Albany: Matthew Bender and Co. 1907.

TREATISE ON ELECTRIC LAW. By *J. A. and H. C. Joyce.* Second Edition. Two volumes. New York: Banks Law Publishing Co. 1907.

PRACTICE IN THE UNITED STATES PATENT OFFICE. By *E. J. Stoddard* of the Detroit Bar. Detroit: Drake Law Book Co. 1907.

STREET RAILWAY REPORTS, ANNOTATED. Edited by *Messrs. F. B. Gilbert, M. Bender, and H. J. Hinman.* Volume IV. Albany: Matthew Bender & Co. 1907.

EPITOME OF THE LAW AFFECTING MARINE INSURANCE. By *Lawrence Duckworth,* of the Middle Temple. Second Edition. London: Effingham Wilson. 1907.

LEGAL ESSAYS. By the late *James Bradley Thayer.* Boston: Boston Book Co. 1908.

AN ESSAY ON PROFESSIONAL ETHICS. By the *Hon. George Sharswood.* Fifth Edition. Reprinted by the American Bar Association. Philadelphia: T. and J. W. Johnson. 1907.

FEDERAL USURPATION. By *Franklin Pierce.* New York: D. Appleton & Co. 1908.

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THE MORAL DUTY TO AID OTHERS AS A BASIS OF TORT LIABILITY.

I.

An interesting problem is presented in several recent cases. How far, if at all, is one man bound, being able to do so without serious inconvenience to himself, to go out of his way to care for those injured without any fault of his?[1] How far is he bound to extricate another from a perilous position? How far must he act, if at all, to mitigate the consequences of an injury, where he is personally free from all fault? It is curious to find that many text writers flatly assert the existence of such a duty, at least in those cases where the harm or peril has been caused by some act of the defendant, even though that act be legally innocent.[2] This doctrine is so opposed to the normal attitude of common law, and to the statements thereof, generally it is true by

[1] *Shaw* v. *R. R.*, 114 N. W., 85 (Minn., 1908); *Raasch* v. *Elite Laundry Co.*, 98 Minn.; *Whitesides* v. *R. R.*, 128 N. C., 229; *Cappier* v. *R. R.*, 66 Kansas, 649, 69 L. R. A., 513, and *Prosperi* v. *Suburban Railway Co.*, 67 Atl. R., 552 (R. I., June 27, 1907).

[2] Beach on Contributory Negligence, Sec. 215; Thompson on Negligence, vol. ii., sec. 1744.

way of dictum, of so many eminent judges,[3] that it is necessary to examine the decided cases to see whether they afford any authority in favor, *first*, of a general duty to act as a good Samaritan; or, *second*, whether innocent but injurious action entails upon the actor a duty to remove as far as possible the injury which he has caused; or, *third*, whether again, there may not be other definite classes of circumstances or relations out of which may arise a duty of this sort peculiar to themselves.

There is one class of cases[4] often cited and which may at first glance seem to support a duty of active care and protection based upon the helpless peril of him who claims it.

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[3] Among others the statement of Willes, J., in *Gautret* v. *Egerton*, L. R., 2 C. P. 371: "No action will lie against a spiteful man, who seeing another running into a position of danger merely omits the warning." Also Mr. Justice Field in *U. S.* v. *Knowles*, 4 Sawy., 517: "It is undoubtedly the moral duty of every person to extend to others assistance when in danger." "And if such efforts should be omitted by any one when they can be made, without imperiling his own life, he would by his conduct draw upon himself the just censure and reproach of good men; but this is the only punishment to which he would be subjected by society." So, Carpenter, C. J., says in *Buch* v. *Amory Co.*, 69 N. H., 257: "With purely moral obligations, the law does not deal. For example, the priest and the Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might and morally ought to have prevented or relieved. Suppose A, standing close by a railroad sees a two-year-old babe on the track and a car approaching. He can easily rescue the child with entire safety to himself. And the instincts of humanity require him to do so. If he does not, he may perhaps justly be styled a ruthless savage and a moral monster, but he is not liable in damages for the child's injury or indictable under the statute for its death.

[4] The most usual cases of this sort are where after a trespasser is discovered in a helpless condition upon the tracks of a railway, an engineer of one of its trains fails to take care to avoid running over him. *Tanner* v. *R. R.*, 60 Ala., 621; *Spearen* v. *R. R.*, 47 Pa., 300; *R. R.* v. *Kelly*, 35 C. C. A., 571. Of this sort is the case of *Pannell* v. *R. R.*, 97 Ala., 298, often cited in support of a duty to take steps to rescue even a trespasser from a perilous position. Here the plaintiff's intestate, being caught between two freight cars, the yard-master seeing his peril, gave no warning thereof to the engineer of the train and allowed it to be operated just as though the intestate was not in danger. Here, of course, the injury was caused by the defendant's positive misfeasance in conducting its business without any regard to the intestate's well recognized peril.

These are the cases which hold, that,—admitting that no duty exists to anticipate the presence or peril of one trespassing upon one's premises or meddling with one's personal property—due regard must be taken in the owner's operation of his business upon his premises or in the use of his property, if the trespasser's helpless peril be known, not to cause him harm.[8] However, the duty here is not to take positive steps to remove the trespasser's peril nor to mitigate or relieve any injury which he may have sustained. They do not lay down any duty to aid or benefit the trespasser; they merely require that the owner shall not by his own action, improper because of the known peril of the plaintiff, turn the trespasser's peril into harm, or add new injury to that already received. Conceding the prevalence and justice of the rule that while no duty exists to anticipate or guard against the merely possible peril of one, who, without the owner's permission, intrudes upon his premises or meddles with his property, a duty does exist not to act after knowledge of the trespasser's presence and danger is brought home to the owner, in a way to ripen it into injury, no support can be derived from it for the contention that the law has recognized as a legal duty the moral, ethical, and humanitarian obligation to aid the unfortunate.

There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive in action, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant.

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[8] The same conception appears to lie at the bottom of the so-called doctrine of Last Clear Chance, applicable to cases where the plaintiff has contributed by his conduct to his own injury. In such case the defendant, though guilty of wrongdoing, is relieved from liability, unless he knowing, or being in duty bound to know, of the plaintiff's helpless peril or injury, fails to take care that he may not add to it by his subsequent conduct. Some of the cases cited in support of the duty to act for the protection of the helpless are merely instances of the application of this doctrine. Such was the case often cited, *Weitzman* v. *Nassau R. R.*, 33 App. Div. N. Y., 585; 53 N. Y. Supp., 905.

This distinction is founded on that attitude of extreme individualism so typical of anglo-saxon legal thought. Misfeasance differs from non-feasance in two respects; in the character of the conduct complained of, and second, in the nature of the detriment suffered in consequence thereof. The difference between the nature of the alleged misconduct is in theory obvious, but in practice it is not always easy to say whether an alleged misconduct is active or passive. There is a borderland in which the act is of a mixed character, partaking of the nature of both.[6]

The difference between the results of non-feasance and misfeasance while quite as fundamental, is much less obvious. The final physical injury to the plaintiff may be the same whether defendant's alleged misconduct is an act of violence or a failure to protect him from the violence of others. But, there is a point intermediate between the plaintiff's actual harm, and the defendant's misconduct, where its consequences are substantially different. In the case of active misfeasance the victim is positively worse off as a result of the wrongful act. In cases of passive inaction plaintiff is in reality no worse off at all. His situation is unchanged; he is merely deprived of a protection which, had it been afforded him, would have benefited him. In the one case the defendant, by interfering with plaintiff or his affairs, has brought a new harm upon him, and created a minus quantity, a positive loss. In the other, by failing to interfere in the plaintiff's affairs, the defendant has left him just as he was before; no better

[6] So, while to use an article known to be defective is palpably misfeasance, and while a mere failure to provide protection for those who by one's bare permission use one's premises is plainly passive non-feasance, the use of a chattel for a particular purpose without having first ascertained whether it is fit for such purpose is a compound of both. There is both action, *i. e.*, the use of the chattel and non-feasance, the failure to perform the positive duty of inspecting it to ascertain if it be defective, and then repairing it so as to secure the safety of those apt to be affected thereby. Still, the final cause of whatever injury is sustained being the use of the chattel, the tendency is to consider that the whole constitutes an act of misfeasance.

off, it is true, but still in no worse position; he has failed to benefit him, but he has not caused him any new injury nor created any new injurious situation. There is here a loss only in the sense of an absence of a plus quantity. It is this latter difference which in fact lies at the root of the marked difference in liability at common law for the consequences of misfeasance and non-feasance.

It may be said with some confidence that the primary conception of the common law was that which regarded the individual as competent to protect himself if not interfered with from without.[7] So, while there is a general liability recognized in common law courts for the natural consequences of all actions whose probable result will be a positive injury to others, duties of positive action for the benefit of others are not general to the common law, but exceptional and abnormal, requiring some other basis than the mere probability that such action is necessary to protect others from an injurious situation not caused by any antecedent misconduct of the defendant himself.

Now, while the duty to take active care for others is not general in the common law, there are undoubtedly many relations to which duties of this nature of varying stringency do attach. It is essential to examine the true nature of such duties and consider their proper place, if any, in the law of tort, to ascertain the various relations to which they attach, and the attributes which such relations possess in common, and so, if possible, discover their underlying basis.

It is more than doubtful whether the breach of an obligation to take positive beneficial action should ever have been regarded as a true tort, so marked are the points of diversions between it and active misconducts. It would perhaps have been better to have confined use of the term tort to misconducts falling within the early punitive, semi-criminal formed writs of trespass, and to those actions on

[7] See J. B. Ames in Harvard L. R.: F. H. Bohlen, 44 Am. Law Reg., 213-15; 20th H. L. R., 14-15; 21 H. L. R., 252.

the case which have broadened and extended the field of active misconduct by an application to new facts and conditions of the principles underlying these early actions or analogous thereto. Thus, only those positive acts which are wrongful because either intended or reasonably calculated to work harm would have been within the field of tort liability. To understand how things so dissimilar in their nature came to be classified as mere branches of the same species of liability, branches the distinction between which, while often legally enforced, is but seldom definitely formulated, certain things must be borne in mind. The common law is a thing of gradual growth, neither right nor obligation was originally conceived as existing without a remedy by some species of action to protect the one, some legal process to enforce the other. There was no broad theory or science of jurisprudence whereby rights and obligations were ascertained and where ascertained protected and enforced. Such classification as there has been in the common law has therefore been along procedural lines rather than in accordance with the substantive nature of rights and obligations.

The introduction of the writ of trespass upon the case for the first time provided a flexible remedy designed apparently merely to supplement the rigid formed writs of trespass and to extend the protection of the law to closely analogous situations. The poverty of remedial process led to the scope of this action being enormously broadened. So it came to be used to enforce every species of legally recognized duty to protect every kind of legally recognized right for which no precisely applicable writ could be found or where the appropriate writ had unduly burdensome procedural incidents. Another influence led to the free use by the courts of this new remedy. In few if any of the early formed writs was trial by jury demandable as of right. In this new action it was. The policy of the courts to encourage trials by jury to the exclusion of the earlier forms

of trials by battle, by oath and by compurjuration they naturally, wherever possible, allowed this new action to be brought in lieu of the old.

In 1537, some two hundred and fifty years after the introduction of this writ, Sir Anthony Fitzherbert, in his treatise de Natura Brevium, the earliest authoritative abridgment of the common law gives a list of the then known actions on the case. There is no attempt at classification, but on analysis they will be found to fall into certain definite classes.

1. Cases illustrating what may be termed the primary use of the writ—the normal extension of the principles underlying the formed writs of trespass to conditions closely analogous to those for which remedy was given by such writs, but where one or another of the precise technical requirements for the operation of such writs being lacking no redress was possible under them: (*a*) either because the harm resulted indirectly and not directly as required in trespass *vi et armis,* or (*b*) the property which was destroyed had been given to the defendant and not taken from the possession of the plaintiff as required in trespass *de bonis asportatis,* or (*c*) the property invaded was not within the protection of the writ of trespass *quare clausum fregit;* being a term of years or a franchise.

2. The second class of case deals with the secondary use of the writ the use of it, not to extend trespass but to enforce duties and obligations having no kinship to trespass or at best only a remote analogy. These again fall into two distinct groups. A. Those which deal with certain positive duties, obligations to act affirmatively: Where the only injury sustained is the loss of the benefit which would have been derived from the proper performance of the duty; where the only right invaded is the right to the beneficial fulfillment of the obligation. These cases stand at the very opposite pole from those just discussed in which there is a mere extension of the field of punishable miscon-

duct. There is here no element of personal guilt.[8] While the word "*negligentia*" is used, it does not signify negligence in the modern sense of the personal breach of social duty. It is the mere failure, from whatsoever cause, to fulfill an obligation only satisfied by performance that is the basis of recovery. Of these Fitzherbert gives several instances; one group, and that the earliest, are those attached by custom as an incident to the tenure of a particular estate or the incumbency of an office. A second group are those which in the modern classification of the common law are segregated into a distinct class, and treated as the very antitheses of tort liabilities. These are the modern contractual obligations; duties having as their basis the consent of those who assume them. As instances of these are given cases of warranties and the case of one who having promised to build certain wagons and having been paid the price fails to do so; the damage laid being the loss of their profitable use. To Fitzherbert these appear to differ in nothing substantial from similar positive obligations annexed by custom to the tenure of real estate. Evidently the time has not yet come when the fact that such obligations rest not on custom or some general policy of law, but upon the expressed consent of the individual, serves to mark them as radically different from all other positive obligations.

B. A class of case is given lying, it may be said, midway between the new broader conception of trespass and positive obligations. These contain the germ and root from which has developed modern social duty to act, if one acts at all, with due regard for the safety of others, and in relations consciously assumed to take precautions to provide for the safety of those with whom one is thereby associated. In Fitzherbert this idea exhibits itself in a duty of proper

[8] So, in *Yelding* v. *Fay* (1596), Moore, 355, it was held that a plea of not guilty to a declaration alleging that by the custom of a certain parish the incumbent was obliged to keep a bull and a boar for the use of the parishioners, and had failed to do so, was bad; for the only offense and wrong is the non-feasance of a thing, and the defendant should allege performance, or deny the custom as raising the duty.

performance recognized as attaching to the exercise of certain trades and calling; many of them the prototypes of modern public or *quasi* public-service trades. These duties are of varying degrees of stringency. In the case of innkeepers the obligation approaches the absolute duty of affording full protection to the guest and his property. In other cases, as that of carpenters or farriers, the duty is rather that of care in the conduct of the business to secure the safety of its patrons.

While there is nothing novel in the cases given by Fitzherbert his treatment of them is instructive as showing the attitude of legal thought at that period and the pronounced tendency to group all rights and obligations into a class determined solely by the remedy applicable thereto. The extraordinary thing is the persistence of this tendency which has led to the retention in the law of Tort of these radically differing obligations. If, however, all the varying rights and obligations being redressable by the same writ are to be considered as substantially similar in their nature it is not strange that they should be all considered to be tort—civil wrongs. Not only was the writ both in name and in many of it attributes—for one the fine payable to the crown—punitive in its nature, but its primary and most conspicuous use was in the development of the idea of civil wrong from a mere series of specific acts of violence to a broad conception requiring abstention from all acts intended or likely to work harm. Only the novelty of the idea that legal duties could be created solely by the consent of the individual without the aid of custom or policy of law; the influence of the civil law and its conception of a consensual agreement as a distinct mental entity, and the great and rapidly growing importance of contractual rights and duties in a community where business and commerce was becoming of paramount importance, served to extricate consensual obligations, themselves the last to find recognition in the common law, from classification with the other affirmative obligations as a mere branch of the law of torts, and place them in a distinct cate-

gory as contracts. No such influence was at work to extricate the residue of positive obligations, they were of small importance, of rare occurrence, and so they remain to-day a little understood and disturbing anomaly in the body of the law of tort. Were it possible to rearrange and reclassify common law liabilities and duties one might place all obligations to act in a class[9] distinct from the obligations to refrain from injurious actions (if this indeed be the proper conception of tort liability). While such an attempt would, at this date, savor of mere theory and useless affectation, it is quite possible to segregate such positive obligations as remain after the removal of those based solely on the consent of the individuals into a distinct class of tort obligation.

This class is composed of certain distinct groups: *First,* those obligations expressly created by statute, in which the extent of the obligation depends entirely upon the intent of the legislative body which enacts the statute. *Second,* those arising out of the family relation. *Third,* those attached by custom as an incident to the tenure of real estate, or the incumbency of some office. *Fourth,* those annexed by the policy of the law as necessary incidents to a relation voluntarily assumed, normally varying in extent as the relation is gratuitous or beneficial to him on whom the obligation is laid.

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[9] Under such a classification contracts would form but one of the subdivisions into which from their varying origins such obligations would be divided. One, it is true, of an importance overshadowing all the rest and, owing to its origin in individual consent rather than custom or policy of the law, differing radically in its legal incidents from the others. Thus, it creates rights and obligations only as between the parties to it; the obligation is absolute to perform the thing promised; no principle of justice or public policy requires that duties freely and voluntarily assumed should be satisfied by anything short of full performance, while where by the policy of the law a burdensome duty has been imposed it is customarily held that all that can be asked is that care shall be taken to secure performance; one violating a contractual obligation is liable only for those consequences of it which are also probable when it is assumed. In these respects it so radically differs from other positive obligations that it may well be that even in a new classification that contractual obligations should be placed in a class by themselves.

The first class requires but little attention. There can be no question that the Sovereign, the State speaking through its legislative branch, may in the absence of any Constitutional prohibition impose such obligations as it may please upon its subjects or citizens to secure the safety of their fellows. The sole problem, and it is by no means in all cases a simple one, is to ascertain the actual intent of the Legislature as expressed in its act.

There is perhaps some doubt as to the existence in the early common law of any legal duty arising out of family relation and owed by the one member to another. Blackstone it is true asserts positively that such duties exist but he asserts it so broadly, including, as he does, duties such as that of education which have never been recognized as having legal existence, that it is doubtful whether he is not speaking of a moral and ethical duty rather than a strictly legal one. However, the great weight of modern authority is in favor of the existence of a legal duty resting upon a father or husband to provide the necessaries of life to his children or wife. Whether these necessities of life include medical assistance is perhaps doubtful,[10] but, admitting the existence of the duty in its broadest scope, it is predicated upon the ability of the one upon whom the duty is alleged to rest to afford the necessary protection and the dependence and helplessness of him who claims that the duty is owing to him. It is certain also that the family relation must exist; neither mere association without such relation nor a meritricious relationship creates such a duty.[11] Nor have the obligations incident to family relationship generally been

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[10] See Coleridge, C. J., in *Reg.* v. *Downes*, 13 Cox, C. C. 111. It is probable, however, that the doubt which he expresses is as to the nature of the duty rather than as to its existence; whether the duty is one to act *bona fide*, with good intentions, or to act as a normal man would act, or is absolute to provide medical aid if possible. The actual point in the case was whether the accused's religious scruples against giving of medicine would afford a defence where death resulted from a failure to provide medical assistance.

[11] *Beardsley* v. *State*, 113 N. W. 1128 (Mich.), 1908.

extended beyond the definite limits of furnishing necessaries of life.[12]

The duties incident to the tenure of real property, either by general or special custom, and to the incumbency of office, are for the purposes of this article of small moment. An occupant of real property is bound at the least to see that care is taken in the maintenance and construction of all artificial structures and conditions upon his land, that they shall not become a source of injury, either permanently or in some particular occasion, to those who, as abutting property owners or persons using adjacent highways, are forced in the exercise of their own independent rights into contact with the property. The duty goes no further than to afford to such persons this species of protection. This lies exclusively within the power of the occupant, he having the exclusive control of the premises; as to this, the abutting owner or wayfarer, being helpless to protect himself, must and is allowed to rely upon the occupant. But there is no general entrusting of the wayfarer or of the adjacent property owners, persons or property to the land owner's care, and therefore nothing out of which a general duty of protection can arise. None the less, the duty, in so far as it goes, has all the attributes of positive obligation. It is

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[12] One can hardly help suspecting that the interest of the State in seeing that it should not be unduly burdened with the support of those whose own family were able to support them has had much to do with the legal recognition of these duties. Certainly the numerous statutes passed giving to the State the right to enforce the duty of the head of a family to care for its members in relief of the burden imposed upon the State in caring for those whose families have neglected them has tended to define and possibly to restrict the extent of those duties. A larger duty of protection is enforced in the case of the *Territory* v. *Manton*, 7 Mont., 162; 8 Mont., 85. The defendant was convicted of the manslaughter of his wife upon the following facts: The two having got drunk together in a neighboring town, walked back to their farm, some miles away. The wife in her drunkenness fell some hundred feet from the house, and was allowed by her husband, who was also drunk, to remain in the snow all night without any effort to save her, though he could readily have done so. This case goes to the extent of recognizing that a husband at least owes a duty to take active steps to rescue his wife from a position of peril into which she had fallen, either by mischance or from her own misconduct.

one which is not satisfied by mere personal care to secure safe repair. While it is doubtful whether the obligation has preserved its early absolute character as exhibited in the cases given by Fitzherbert;[13] whether or not it is the landlord's absolute duty to maintain his property in good repair, it is at least certain that he is bound to see that care be taken to ascertain the necessity for repair, and to have such repairs as may be necessary carefully made. And this duty is one which he cannot delegate to an independent contractor or any other person so as to escape responsibility if the requisite care is not exercised in these particulars.

Duties annexed by policy of law or custom to relations voluntarily assumed occupy the most important field and afford the most difficult problems both in theory and in practice. In some respects they closely resemble contract—while not expressly assumed, but imposed by law, they are only imposed upon and as an incident to relations voluntarily and consciously entered into; volition at some stage is essential. In consequence of this apparent kinship to contract, and of the fact that many of the relations to which they are attached are themselves the creatures of some contract, the position in the common law of these obligations has been highly uncertain. At one time the idea was prevalent and is by no means even yet extinct, that where the relation was contractual in its origin the obligations legally attached thereto arose out of a tacitly recognized implied term of the contract itself.[14] Where, however, the relation existed in the absence of contract, or where though such a contract existed, the person injured was not party to it, it was evident that there must be some basis, other than that of contract, upon which the duty must rest, if it existed, as it admittedly did in such cases. The present tendency is to recognize such duties as in all cases arising out of the relation by reason of

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[13] Ante, p. 224. And in *Yelding* v. *Fay*, 1596 Moore, 355, *supra*, p. 224, note 8.

[14] The idea being in effect this: that since every man is taken to know the law, if he agrees to assume a relation, he agrees to conform to all the legal incidents thereof.

some policy of law, and as based solely upon the consent of him upon whom they are laid.

It would be impossible to set down at length all the relations to which this duty attaches. Among the more usual and important are: First, the exercise of trades, businesses, and professions.[15] Second, the use for one's own purposes of real and personal property. Third, the relation of master and servant.

These duties vary as the business is public, one to whose services every one of the public is of right entitled and where safety of the whole public is dependent on the care with which it is organized and conducted; or private where the right to become its patron is a matter of private bargain and its proper conduct affects only those bargaining to receive its services.[16] It reaches its highest exhibition where for reward services are tendered or the use of property offered to the public or such of them as may choose to avail themselves thereof, and where the safety of the public in person and property will be imperiled unless care is taken. As where one of the early recognized public employments, such as that of innkeeper, carrier, or the like, or one of their modern derivatives, a business carried on under a public franchise and given special rights because of its benefit to the community, is being exercised, or, where some premises is offered as a place of public resort.

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[15] This duty was early recognized, and while, perhaps, not fully developed in the modern cases so as to adequately carry the principles of the earlier cases to their logical conclusion under the changed conditions of modern life, it is still one which has obtained general recognition.

[16] It may well be that the distinction between public and private business lies primarily in this. In a public business, one held open for the accommodation of all, where all must be equally served, every member of the public has a right to accommodation, and is entitled to presume that the business has been carefully organized and conducted with a view to his safety, whereas in purely private business there is no right on any one's part to accommodation; it is entirely a matter lying in private bargain, and the patron can make what terms he please for his own protection, just as a vendee could protect himself, and was originally required to protect himself, by appropriate warranties.

The duty on the other hand sinks to a minimum where the relation is wholly gratuitous, where some service is rendered or property allowed to be used purely as a matter of accommodation to another, and where such service is not rendered as an incident to a profession or business in general carried on for profit, and from the careless exercise of which great injury to human life is probable. In such cases good faith and fair dealing are alone required—full disclosure of the dangers actually known to exist in the property gratuitously offered for another's use.[17]

In the intermediate class of case where a private business is carried on for gain, or premises used for the private business purposes of the occupant, there is also a duty to use due care to secure the safety of the patron in those particulars as to which the defendant has exclusive control. So, it is the owner's duty to see that care is taken to ascertain the true nature and condition of his premises and to make the actual condition conform to the apparent condition by either repairing the defect discovered so as to make it as good as it looks, or by giving notice of the defect so as to show it to be as bad as it is.[18]

These duties varying as they do among themselves in extent, and differing from other positive obligations in those incidents peculiar to their particular origin, all require certain basic conditions for their existence and possess certain attributes common to all positive obligations. First, the

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[17] However, it is doubtful if property be even gratuitously supplied, known to contain a latent defect whether it is not the supplier's duty to see that notice of such defects is brought home to the user, and whether he could free himself from this liability by entrusting it to an independent contractor or utter stranger. Such cases would be of rare occurrence, for it is very unusual that an owner who allows persons to gratuitously use his premises entrusts the giving of notice to any one other than a servant of his own; whose neglect, of course, is legally equivalent to the personal neglect of his master.

[18] And there is a marked tendency to hold that this duty is one which cannot be delegated; that it is to see that care is taken by whomsoever the task of inspection or repairing or constructing the premises is entrusted to, that it shall contain no hidden defect. *Mulchy* v. *Congregation*, 125 Mass., 87; *Stevens* v. *Company*, 73 N. H., 159.

duty of care is predicated upon the ability of the one to afford protection and the helpless inability of the other to protect himself; and his consequent necessary dependence and reliance upon his associates' care. Second, these duties usually, though perhaps not universally, exhibit that characteristic incident of the earlier positive duties—the requirement of something more than mere personal good conduct, a liability dependent upon the non-performance of the obligation to whatever extent it may exist.[19]

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[19] It may, however, be said, that the tendency of modern legal thought is to mitigate the rigor of these positive duties. The earliest duties appear to have been quite as absolute as modern contract obligations. Those attached to the earliest recognized public employments such as inn-keeper and carriers must be performed unless prevented by some force overpowering in its nature, such as the act of God or the King's enemies. Just as the tendency has been to restrict by legislation or to allow the restriction by the agreement of the parties of these stringent duties, so, in the newer relations, the tendency has been to allow him upon whom the duty is laid to absolve himself by showing that all care has been taken by whomsoever the performance of the duty has been entrusted to, to procure its proper performance. So, the duty annexed to such new relation is not so much to make the premises or business safe as to answer that care has been taken to secure safety. There also appears a reluctance to extend even this duty to all situations where a consistent logical application of the underlying principles would seem to require it.

It is difficult to see any logical distinction between the facts in the case of *Francis* v. *Cockrell*, L. R. 5, Q. B. 184, 501, where it was held that the stewards of a race meeting were liable for the injuries received by a ticket holder through the fall of a grandstand, though it had been constructed by an admittedly competent independent contractor, and the stewards themselves were in no fault, and in the case of *Searle* v. *Laverick*, L. R. 9, Q. B. 122, where it was held that a livery stable keeper was not liable to a customer whose carriage was destroyed by the fall of a coach-house erected upon his premises by a competent independent contractor employed by him. The reason given, that in the average case livery men rent their premises and therefore a customer can only expect of them careful selection and inspection of the premises in which they do business, seems unsatisfactory. For in this case it was constructed at the instance of the defendant upon his own premises expressly for use as a coach-house, and there would seem no good reason why general conditions should control, when in fact it appears that the actual conditions are exceptional. There would seem to be no greater ability on the part of the stewards than on that of the liveryman to secure a proper structure; nor would the public at a race meeting have greater reason to expect that the stewards would personally erect a grandstand than a customer that a stablekeeper would personally build his own stable. The real effect of the two decisions seems to be that the English courts are not prepared to recognize this stringent

As to the first, it will be found that this duty, like all other positive duties, arises only where the one party, having exclusive control of the cause of harm, is able to afford protection and the other, being by the very nature of the relation prevented from protecting himself, must look solely for his safety to his associate. And here it is to be borne in mind that the common law requires impossibilities of no man. It does not require care incompatible with the proper exercise of the business conducted.[20] Nor does it ask that precaution shall be taken to provide against merely possible but unusual and improbable mischances.[21] These duties, being both abnormal and onerous, arise only where necessary for the protection of those unable to protect themselves, and extends no further than to secure protection against probable dangers wholly out of the control of such other. Where the relation is wholly voluntary on both sides, even if beneficial to him who offers it, nothing more can be asked than a full disclosure of the true conditions under which it is to be maintained. The other may protect himself, without foregoing the exercise of any legal right, by refusing to enter the relation or by withdrawing from it.

In none of these relations is the one party made the guardian of the general well-being of the other. The duty extends only to take care as to those things which from the very nature of the relation must be in the exclusive power and control of the defendant, and as to which the plaintiff

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liability, practically that which a carrier owes to its passengers, save where the public are for the defendant's purposes induced to trust their persons to his care, as a passenger entrusts his safety to his carrier, and where some temporary structure is erected for immediate public use.

[20] As was said by Lord Holt in his celebrated opinion in *Coggs* v. *Bernard*, 2 Lord Raymond, 717-719, in which for the first time an attempt was made to systematize the English law dealing with that conspicuous voluntary relation of bailor and bailee, and in which much of the civil law learning was imported into the body of common law, "it would be unreasonable to charge" a bailiff or factor "with a trust further than the nature of the case puts it in his power to perform."

[21] See *Stager* v. *Troy Laundry Co.*, 38 Oregon, 480; infra, p. 240, note 37.

must look for his safety solely to him. Even a carrier owes no duty to its passenger to protect him from all injuries or to remove him from every perilous situation into which he may fall while en route, nor to care for him if injured by a cause unconnected with the means of transportation.[22] While it is bound to take care to operate its business so as to not to expose its passengers unnecessarily to dangers of which it is aware whether proceeding from the acts of the company itself, or of its patrons [23] or even of strangers; [24] this is because the passenger, by placing himself in the charge of the company, confined by the very necessities of the transportation to its car, and being in effect imprisoned therein has no power to avoid such dangers, and must look to his carrier to keep him out of range of them. But the carrier owes no duty to provide medical attendance to an ill passenger [24a] or clothes to ill-clothed, or food to one who

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[22] In *Prospert* v. *R. R.*, 67 Atl. Rep., 522 (R. I. 1907), it was held that a carrier's duty to its passenger does not include an obligation to supply them with shelter when exposed to cold by reason of an unavoidable delay in transportation, and that it was not liable to a passenger in a car stalled for many hours by the snow or a failure of its conductor to obtain for her and her infant child shelter in some adjacent farmhouse.

[23] *Kennedy* v. *R. R.*, 32 Pa. Sup. Ct., 623.

[24] *Dufurr* v. *R. R.*, 75 Vt., 165.

[24a] See *R. R.* v. *Statham*, 42 Miss., 607, pp. 612, 613. If passengers are when they embark "through illness incapable of taking care of themselves, they should have attendants along to care for them." See, also, *B. & O. R. R.* v. *Woodward*, 41 Md., 268, p. 290. In *A., T. & S. F. R. R.* v. *Weber*, 33 Kans., 543, it is intimated that if a passenger becomes sick while *en route* the carrier owes him a duty to remove him from its train and to care for him until he can be turned over to the public authorities charged with the care of the helpless sick. This, however, was in the particular case, merely dictum, the actual decision being that while the carrier has a right to eject a passenger so drunk as to be offensive to his fellow-passenger, in so doing it must not expose him to unnecessary peril by leaving him helpless in a dangerous place, or exposed to the elements till the proper public officers arrive. In many respects the case resembles *Fluteau* v. *Dupue*, 111 N. W., 1, and *Weymire* v. *Wolfe*, 52 Iowa, 533, where it was held that neither an ill guest nor a drunken patron should be sent helpless out into the cold. If a passenger is palpably ill, or even drunk, the company is bound to exercise in its operation care proportionate to his helplessness to protect him from injury therefrom, *Wheeler* v. *R. R.*, 70 N. H., 607, and it may well be that even if the passenger is not offensive to his fellow-passen-

improvidently starts upon a long journey insufficiently supplied, all these matters being usually within the power of the passenger. A striking instance of this principle is the divergent liability for the loss of a passenger's baggage turned over to the company's exclusive care, where its liability is practically that of insurer, and for the loss of baggage retained in the passenger's personal custody, which attaches only where some defect in the company's plant or operations has caused injury to it. So, it has been held that a railroad company is not bound to stop its train to recover a bag of jewels retained in a passenger's custody which falls from a window of its car without fault on its part.[25]

This principle appears perhaps most strikingly in the duties attaching to the relation of master and servant. This relation is voluntary on both sides and is for the benefit of both. The master's duty extends no further than to take care not to expose the servant to unnecessary risks from sources over which the master having exclusive control has the sole ability to protect the servant, and, from which the servant, being ignorant of the true condition of affairs, is unable to protect himself by withdrawing from the service.[26]

He must provide and prepare as to those matters within his exclusive control a business as safe as it appears to be. The master's duty in this respect is usually said to comprise only certain definite duties, these (1) of supplying safe tools and appliances; (2) a safe place to work; (3) a sufficiency of not obviously incompetent fellow-servants; (4) a safe system of rules and regulations where the complicated nature of the business makes it necessary for

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gers, the company may still, to relieve itself from this burden, which may well be one incompatible with the proper operation of its business, remove him from its train. But if they do so, they are of course bound to exercise care not to cause him unnecessary peril or exposure.

[25] *Henderson* v. *R. R.*, 122 U. S., 61.

[26] We must keep constantly in mind one principle peculiar to this relation. The business being one operated for the joint benefit of both master and servant, the master is not responsible for its negligent

the servant's protection, and (5) in many jurisdictions some by common law and some by statute, efficient superintendence. These, however, are but the more usual instances of the application of the general principle which requires from the one, able to afford it, protection to the other incompetent to protect himself. These are the usual things over which the master has the exclusive control and the sole power to make safe; the servant if ignorant of the defects therein being unable to protect himself by withdrawing from the employment, and by the very nature of the employment being forced to take and use what the master provides him and so to look solely to his master's care in these particulars for his safety.

It would seem therefore to be erroneous to regard these enumerated duties as the sole duties owed by the master, and to refuse to recognize the existence of any further duty unless it can be brought by some strained reasoning within the terms of one of them. On the contrary, it would appear that wherever, from the peculiar nature of the business the servant must rely exclusively for his safety upon the master's care, in any particular, even though it falls outside of these well defined duties, there does exist a duty on the master's part to take care for the servant's safety in these respects. So, while it is not normally the master's duty to furnish food or clothing to a servant, or to render him medical assistance and while,

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operation by those to whom he entrusts it in the absence of personal misconduct on his own part. A servant injured by the negligence of a fellow servant in the operation and not the preparation of a business has, therefore, no right of action against his master. But the preparation of the business being wholly within the power of the master, he is bound to see to it that care is taken to provide a business as least as safe as it appears to be. This obligation has also this anomalous feature among positive duties. While it cannot be delegated to a servant of the master, or to a special branch of his business which is devoted to its performance, so as to escape liability for its non-performance, it may be entrusted to a competent independent contractor where the thing to be provided as a matter of preparation of a safe business is one which is ordinarily left by the average man to independent contractors.

in general, even a contract to do so will not give the servant the right of action for injuries sustained through the lack thereof; this is only because there is nothing in the nature of the ordinary employment to prevent the servant from being just as capable, save for the difference in financial position (which the common law regards as of *no* moment) to supply himself as the master is to supply him. But, it may well be that the nature of some particular employment may require the servant to trust himself in these particulars to his master's care just as in general he must rely upon it in respect to the character of the tools which he uses. Out of just such a situation has arisen the duty recognized in the maritime law as resting upon a vessel and its owner to provide sufficient food, and in America at least, medical attendance to its seamen.[27] And the reason given is that the very nature of their employment causes them to be during the voyage entirely under the control and at the mercy of the master of the vessel, and to visit foreign ports where if cast adrift ill and without resources and very possibly ignorant of the language, they would be utterly helpless, while the master is able to cause the sailor to be properly cared for. There appears to be recognized a further duty on the part of a ship to its sailors, to make all reasonable efforts to rescue them if they fall overboard from any cause whatsoever.[28] And it would appear that this is a not improper extension of the ship's duty. The very nature of the employment is one subjecting the sailor to grave risk of just such peril, and his helplessness and the master's ability to protect him, is manifest.

Now, while the maritime law in many respects differs from the common law, and the existence of a duty recognized by the one is not an authority for its existence in

[27] So, in *Scarf* v. *Metcalf*, 107 *N. Y.*, 211, it was held that an action lay by a sailor against the owner of his ship where his injuries had been greatly aggravated by the captain's failure to provide proper medical attendance.

[28] See Field, J., in charging the jury in *U. S.* v. *Knowles*, 4 Sawyer (U. S.), 517.

the other, none the less that where the nature of the employment though on land is similar in its attributes to that of a sailor where there exists the same isolation, the same expectable inability on the part of the servant to provide for himself, the same complete dependence upon the care of the master and the same risk of illness or injury inherent in the very nature of the employment it would seem that the general principles governing the duty of a master to his servant (of which the duty to provide safe tools, etc., are but instances) demands that the common law should equally with the maritime law recognize the duty of a master to feed, clothe, and provide his servant with necessary medical attendance. And it is submitted that the cases tend to support under appropriate circumstances the existence of such a duty, at least to the extent of supplying proper food and lodging. While it is held in *R.* v. *Smith*,[29] that a master is not guilty of manslaughter in failing to supply food and lodging to a servant who was *sui juris* and was free to leave the master's house and was not coerced by threats or ill treatment to remain, it is otherwise where the servant is so reduced in mind and body as to be within the entire control of the master, or where the servant, being of tender age, is equally under the master's dominion.[30] And one who imprisons another, though legally, is bound to provide his prisoner with necessaries.[31]

So, where the nature of the employment is for any cause, as for instance its isolation, its distance from any place where the servant can be expected to be able to supply himself, is such that it is evident that he must look solely to his master for food or lodging many cases recognize the master's duty to provide them for him.[32]

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[29] 10 Cox, C. C., 82.

[30] *R.* v. *Ridley*, 2 Campb., 645.

[31] *R.* v. *Edwards*, 8 C. & P., 611.

[32] In *Shoemaker* v. *R. R.*, 46 Minn., 39, it was held that a railroad company having sent a gang of men out to an isolated point in very cold weather was bound to provide them with transportation to some point where they could provide food and shelter for themselves. So,

The duty of a master to supply medical or surgical aid seems to be even more doubtful.[33] In *Wennall* v. *Abney*,[34] it was laid down broadly that a master is not, in the absence of contract, bound to supply medical attendance for even his domestic servant, the case was one where an action was brought against the master to recover for medical attendance furnished the servant. One reason given for denying the master's liability was that it would be highly and unnecessarily onerous to require one, who was obliged by the necessities of his trade to hire a servant for a very small wage, to be subject to a contingent liability, entirely beyond his ability to bear, for the cost of effecting a cure of some serious disorder entailing large expense.

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in *Clifford* v. *R. R.*, 9 Col., 333, it was held that where a man was employed to work at an isolated point, the master was liable in an action of tort for a failure to supply suitable food and lodging. True, the contract specified that the master engaged to supply these, but had the servant been able to supply himself and not wholly dependent upon his master, in view of the nature of his employment, even in an action upon the contract, he could not have recovered for more than the costs to which he had been put in procuring them. The contract, in a word, merely showed that the servant was entitled to rely upon his master in these particulars. So, in *Hyatt* v. *R. R.*, 19 Mo. App., 287, it was held that where a gang of men had been sent out to shoved snow drifts, and one of them was frozen, owing to a failure to send out a heated car as a shelter, as the superintendent had promised, a recovery might be had. The superintendent's promise did not amount to an actual contract; it was at best a mere assurance that the car would be sent. It gave the servant reason to work on, relying upon that his master would afford him the protection necessary to make his work safe, and removed all ground for claiming that the servant had assumed the risk, knowing that he must look out for himself. The case is, therefore, in line with those where a servant, though knowing that a tool or appliance is defective, continues to use it upon his master's assurance that it will be repaired. In *King* v. *R. R.*, 23 R. I., 583, it was, however, held that a railroad company was not liable to provide sufficient clothing to one whom it sent out to shovel snow at a point remote from human habitation. Here, however, the servant knowing the work he was expected to do, the place where he was expected to perform it, and the severe weather then prevailing, could have protected himself. He knew the conditions and could have dressed himself accordingly, or if he had not the means to afford proper clothing, he could have refused to work, or insisted upon his master supplying him with the necessary clothing.

[33] Compare as to this the doubt as to any such duty as arising out of family relationship. Ante, p.

[34] 3 Bos. & P., 247.

Here, however, the servant who was injured in his master's service was taken to his mother's house and there treated by the plaintiff and there was no doubt but that had the mother been unable to care for her son she could have obtained medical attendance from the parish. The servant was therefore neither by the very nature of his employment nor under the circumstances of the particular accident necessarily forced to look for such aid to his master alone, who was in fact not even present when the injury was received. When, however, the servant is employed to do hazardous work in a place or under circumstances making it evident that he must look solely to his master for such immediate and urgently required care and attention as can only be rendered on the spot, it is held in *Early* v. *R. R.*[35] and *Shaw* v. *R. R.*,[36] that it is the duty of the master's representative upon the spot to make a *bona fide* effort to relieve him. This duty so closely akin to that owed by a ship to its seaman and existing where the employment is closely analogous in its incidents to that of a sailor on a voyage, arises only out of absolute necessity. It would not exist when as in *Wennall* v. *Abney*, the servant though injured could provide medical aid for himself or could turn to relief to the public authorities primarily charged with the care of the indigent sick. It would arise out of the emergency and expire with it. It would not require the master to support, care for and provide medical attendance for his servant till cured. As it would only bind the master only to render the servant such immediate aid as was possible on the spot and transportation to a point where he could be properly cared for, either by himself, or by the public; nor would it require that a surgeon should be maintained to treat such cases as they arose;[37]

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[35] 151 Ind., 73.

[36] 114 N. W. (Minn., 1907), 85.

[37] *Stayer* v. *Troy Laundry Co.*, 38 Oregon, 480. "It is unusual to anticipate accident and provide for the most speedy relief when such an exigency arises." The master need do no more than provide for the normal and expectable; he need not anticipate and provide for the merely possible but improbable.

all that would be demanded would be such humane attention, such "first aid to the injured" as could be expected from the master or his representative upon the spot.

In *King* v. *R. R.*,[38] it was, however, held that while the conduct of a conductor of defendant in refusing to carry home an employee whose feet had become frozen while shoveling snow at an isolated point on its line, was, morally speaking, highly reprehensible in a gross act of inhumanity, the company owed no legal duty to him to transport him to a point where his injuies could receive attention.

Here it is necessary to discriminate between duties and privileges. Between the right under the certain circumstances to act in a particular way, and the duty to do so. No doubt a father may justify force in defence of his son; a servant in defence of his master; a husband in defence of his wife, and *vice versa*. But while he is privileged to interfere for his son's or master's or wife's protection, he is under no legal duty to do so. No action has ever been maintained against the cowardly servant, father, or husband, who ran away when his master, son, or wife was attacked. So, while it is constantly held that a man may justify taking very considerable risks in order to save human life,[39] none the less there appears to be no legal liability if he fails to do so.[40]

It is important to bear this distinction in mind in considering another class of cases, those in which it is held that a corporate agent may bind its principal for expenses incurred in aiding servants patrons, or strangers, who have been injured by the innocent operation of its business. The scope of a servant or agent's employment is by no means limited to the performance of those acts which the employer is legally bound to do. Of course, if the act is one which the employer is bound to have done, it will be inferred that a servant performing it is authorized to do so.

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[38] 23 R. I., 583.

[39] *Eckert* v. *R. R.*, 43 N. Y., 502; *Corbin* v. *City*, 195 Pa., 461.

[40] See Carpenter, C. J., *Buch* v. *Armory Co.*, 69 N. H., 257.

But there are many things which are purely discretionary with the master, but which may yet well fall within the scope of the servant's employment if they tend to advance the master's interests. It by no means follows, therefore, that because a railroad is held liable to a physican employed by its conductor or other official representative to render medical assistance to persons injured by its operation that the court is prepared to recognize that it is the company's duty to render such services.

So, while it is held in England that a general manager has the power to bind a railway for its surgical attendance furnished persons injured upon its lines,[41] and that an inspector whose duty it is to care for persons injured, by its operations may pledge the credit of the company for lodgings furnished to such persons at an inn,[42] no English case can be found holding the railway liable for a failure to supply either medical attendance or lodgings to those innocently injured by its operations. So, while it has been held in Kansas that a division superintendent has authority to provide medical attendance to a servant [43] though not to provide similar services for a passenger [44] the existence of any duty to care for those whom one may innocently

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[41] *Walker* v. *R. R.*, L. R., 2 Ex., 228.

[42] *Langan* v. *R. R.*, 26 L. T. N. S., 577.

[43] *R. R.* v. *Winterbotham*, 52 Kan., 433.

[44] *R. R.* v. *Batty*, 35 Kan., 265. It is difficult to see the force of the distinction drawn between aid to a servant and to a passenger. The reason given is that the master has an interest in preserving the health of a skilled employee, but they have no similar interest in the health of a passenger. This, however, seems to overlook the interest which the company possesses in minimizing the injuries of its injured passengers, and so reducing the amount of the damages recoverable if it turn out that the railroad has been delinquent. Since the company's representative must act at once, he can hardly be asked to determine on the spot whether the accident renders the company liable or not, and he should be, therefore, allowed a certain latitude of discretion as to whether it is to the company's interest to aid the passenger. And the company's liability should not be allowed to depend upon whether he turned out to be right or wrong in his judgment. It would appear that a railroad is not responsible for the acts of its train crew in their humane effort to relieve the sufferings of an injured trespasser. The company owing no duty of relief to trespassers, acts of the crew are done out of purely personal

injure, or to remove them from a perilous situation in which one has innocently placed them, is expressly denied in *Cappier* v. *R. R.*[45]

On the whole, it may be said that duties to take positive action for the benefit and protection of others attach only to certain relations; and are imposed only when absolutely necessary for the protection of others and only to the extent generally necessary to afford them protection. Save where the state has by legislative enactment imposed such obligations, they do not exist, unless there be some family relation; tenure or occupancy of real property, or the voluntary act of consciously entering into some relationship to which such duties are attached because necessary for the protection of one's associates. Even in the case of family relationship there is present the will of the citizen to become a husband or father, so that even here the relation is, in the last analysis, the creature of voluntary action on his part. The occupancy of real estate is, save perhaps in the case where it comes into one's possession by inheritance, a conscious voluntary act.[46] It is not too much to say therefore that saving the case of an inherited estate, if indeed this be an exception, no man can be saddled with a burden of positive action without some voluntary act on his part which renders him subject thereto. In addition it would appear that save in the case of family relations, where the interest of the state to avoid being unduly burdened with the support of those whose relations are able to care for them naturally leads to the burden of the support of the members of a family being placed upon its head, no obligation beyond that of good faith and fair dealing is laid upon any individual

humanity and have no tendency to further the company's interests. So, in *Ollet* v. *the R. R.*, 201 Pa., 361, it was held that where a train crew had taken a youthful trespasser against his protest to a hospital the company was not liable to him in an action of false imprisonment.

[45] 66 Kan., 649.

[46] It is perhaps possible even to presume a willingness to take the benefit of an inheritance; at all events the estate at some period has come into the line of descent by the voluntary act of some ancestor.

unless he voluntarily occupies a relation materially beneficial to him. Finally it may be said that these obligations only attach where the one party, having exclusive control of a condition, has the entire power to prevent harm arising from it, and where the other, from the very nature of the relation, must be altogether helpless and incapable of protecting himself, and so is forced to rely implicitly upon the care of his associate for his safety.

Francis H. Bohlen.

(*To be Continued.*)

VESTED AND CONTINGENT INTERESTS AND THE RULE AGAINST PERPETUITIES.

Mr. Kales[1] takes the ground that Mr. Gray's exposition of the distinction between vested and contingent interests is capable of some further development. Mr. Kales then makes some criticism on the definition given by Mr. Gray, and on his position as to the application of the rule against perpetuities to remainders. He points out that it is of vital importance to a writer on the rule against perpetuities to know what the exact difference is between a vested and contingent remainder. It is proposed in this article to offer a few suggestions on the subject.

What is a contingent remainder, and what is the exact nature, if it can be ascertained, of the contingency upon which a contingent remainder is contingent?

According to the principle of the common law, there could be no interval between the preceding estate and the remainder. The remainder must fall into place immediately upon the termination of the preceding estate, and if it did not do so, its opportunity to take effect as a remainder was gone forever.

An estate, therefore, which was so limited that it might not take effect as a remainder at the proper time, was said to be a contingent remainder, by which, it is apprehended, was meant that it was contingent whether it would ever be a remainder.

The contingency then, upon which a contingent remainder is contingent, is the uncertainty that it will take effect

[1] Article, "Several Problems of Gray's Rule Against Perpetuities, Second Edition," 20 Harvard Law Review, 192, 1907. See article by Mr. Kales, "Future Interests in Land," 22 Law Quar. Review, 250, 383, July-October, 1906, and criticism thereon, in 20 Harvard Law Review, 243, 1907.

immediately upon the termination of the preceding particular estate, which will happen whenever it is limited to take effect upon an event other than the termination of the preceding particular estate itself. If the event happens too late, the remainder cannot make connection with the preceding particular estate, and therefore is not a remainder at all. It is nothing.

This might occur in two ways: (1) because the event upon which the remainder was limited to take effect might not happen before the termination of the preceding particular estate; (2) where the remainder was limited to a person not yet ascertained, or who might not be ascertained before the termination of the preceding particular estate.[2]

All four classes of Mr. Fearne may be reduced to these two heads.

Mr. Fearne's four classes, as quoted by Mr. Josiah Smith in his treatise on Executory Interests, at page 65, are as follows:

I. "Where the remainder depends entirely on a contingent determination of the preceding estate itself; as if A makes a feoffment to the use of B till C returns from Rome, and after such return of C, then to remain over in fee."

II. "Where the contingency on which the remainder is to take effect, is independent of the determination of the preceding estate; as if a lease be made to A for life, remainder to B for life, and if B dies before A, remainder to C for life."

III. "Where a remainder is limited to take effect on an event, which, though sure to happen some time or other, yet may not happen until after the determination of the particular estate; as if a lease be made to J. S. for life, and after the death of J. D., the lands to remain over to another in fee."

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[2] This is the classification suggested by Lord Chief Justice Willes, in *Smith* v. *Packhurst*, 3 Atk., 135, 1742, (1) where a remainder is limited to a person not in being, and who may possibly never exist; (2) where the remainder depends on a contingency collateral to the continuance of the particular estate.

IV. "Where a remainder is limited to a person not ascertained, or not in being, at the time when such limitation is made;" as if a lease be made to one for life, remainder to the right heirs of J. S., who is living; or remainder to the first son of B, who has no son then born; or if an estate be limited to two for life, remainder to the survivor of them in fee.[1]

As to Mr. Fearne's classification, it may be observed, as to the first class, that the remainder may never take effect at all, if the contingency upon which the particular estate is to determine never happens, or happens after the preceding particular estate has regularly come to an end. The termination of the preceding estate, therefore, is a termination by the happening of a collateral event which is uncertain. That the second and third classes are practically the same. The second is where the contingency is independent of the termination of the preceding particular estate; and the third, where the event may happen after the termination of the preceding particular estate. The third, therefore, is simply a sub-division of the second, and in all these cases, if the event happens after the termination of the preceding estate, the remainder is void, not because it is limited upon a contingency, but because there is then a gap between the termination of the preceding estate and the beginning of the next estate, which gap or abeyance in seisin was not permitted by the common law.

The first three classes of Mr. Fearne may therefore be reduced to the second class of Lord Chief Justice Willes, which may be stated thus: Cases where the remainder is limited to take effect upon the happening of an event other than the regular termination of the preceding particular estate.

There remains, therefore, the fourth class of Mr. Fearne and the first class of Lord Chief Justice Willes, where

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[1] Mr. Smith's statement is valuable, as he adds an example of each class.

the person who is to take is unascertained, which is obviously not reducible to the same principle as obtains in the other class. As to this class, a distinction must be taken. In the case of a devise to A for life, and after his death to the heirs of B, a living person, the remainder to the heirs of B is contingent. It partakes, however, of the first class, in that there is a contingency upon which the remainder may never take effect, that is, if B survives A, and may be considered as belonging to the second class, in that the persons who are to take (the heirs of B) are unascertained. Where there is a devise to A for life, and after his death to his heirs, the case is different. Here there is no contingency that the limitation will never take effect as a remainder. It will fall in place immediately upon the death of A. The remainder is said to be contingent because there is no one ascertained at the present time to take, which leads to a consideration of the other difficulty which was felt at common law in allowing the validity of contingent remainders.

Under the feudal theory, the fee was the unit of ownership in land, and no subdivision of that unit could be allowed which would interfere with the feudal duties due to the lord of the fee. If, therefore, the owner of the fee made a grant thereof, and divided it into smaller particular estates, he must so limit such estates that they fit together exactly, one after the other, without interval or overlap. There could not be two persons occupying the fee at the same time, and there could be no interval of time when the fee was unoccupied.

It was therefore apparent, that a contingent remainder being only a possibility until the event happened, existed solely outside of the fee, and had no place in the compact mass of estates into which the fee was divided until the event happened. When that occurred, the remainder, which was to be valid, must take its place with the other estates, and in some manner acquire a portion of the seisin of the fee. Some estate must be displaced in order to make room

for the new member, and as there was no feoffment upon the happening of the contingency, the common law lawyers found great difficulty in evolving any theory upon which the seisin could pass to the newly arrived remainderman. The difficulty was finally overcome, however, by the fiction of saying that the seisin remained in the feoffer until the happening of the event, and then passed on from him to the remainderman.

A contingent remainder, therefore, may be defined as follows: A contingent remainder was, at common law, a limitation of an interest in real estate, which might never take effect as a remainder owing to the circumstance that it was limited to an unascertained person, or limited to take effect upon an event other than the regular termination of the preceding particular estate.[4]

A vested remainder at common law was an estate given to an ascertained individual and limited to take effect upon no other event than the regular termination of the preceding particular estate.[5]

Mr. Kale, in the article above referred to,[6] points out that the conception of what is a contingent remainder has changed in modern times. He instances: The cases which present themselves under modern statutes, of how far a contingent remainderman has a right to ask for partition or call trustees to account. In such cases, the courts have

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[4] Mr. Gray offers no definition of a contingent remainder. Mr. Fearne's definition is as follows, Contingent Remainders, page 3: "A contingent remainder is a remainder limited so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate, for if the preceding estate determine before such event or condition happens, the remainder will never take effect."

[5] Mr. Gray (Rule against Perpetuities, 2nd edit., sec. 101) draws the line between vted and contingent remainders thus: "A remainder is vested in A, when throughout its continuance A, or A and his heirs, have the right to immediate possession whenever and however the preceding estate may determine." Does not a remainder coming within the definition suggested fulfill the requirement laid down by the learned author?

[6] 20 Harvard Law Review, 192, 1907.

abandoned the feudal notion of what is a remainder, and it is submitted, rightly so. At common law, a remainder was none the less vested even though it might never take effect. It would be absurd, however, to permit a person who might never have any interest in the land, to compel a partition, or permit a person who might never have any interest in the fund, to compel the trustee to file an account. It would seem, therefore, to be a practical common sense rule, that the only person who could compel proceedings in such cases would be a person who possessed an interest which was sure to come into effect. This difference, therefore, in the conception of what is a contingent remainder is explainable by the practical necessities of the case.

THE RULE AGAINST PERPETUITIES.

The rule against perpetuities, as finally defined by Mr. Gray,[1] is as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."

It is submitted, with diffidence, however, that this is not the rule against Perpetuities at all. The rule itself destroys certain interests limited upon contingencies which may occur after a certain period.

The interests which the rule does not destroy, that is, which are not within its purview, are the interests which are good. So far as the rule is concerned, Mr. Gray's statement, therefore, simply describes the class of future interests to which the rule does not apply. It is therefore respectfully submitted that it is not a statement of the rule at all. The relation which Mr. Gray's statement bears to the rule itself may be shown by an illustration: Suppose an act were passed, making it unlawful to enter a dwelling house after eleven o'clock at night without the consent of the owner. If there were no further law on the subject, an entry in the daytime without the consent of the owner

[1] Gray on Perpetuities, 2nd edit., sec. 201.

would be lawful. The law punishes an entry made after eleven o'clock. It is, however, a statement only of the practical result of the law to say, that no entry in a dwelling house, without the consent of the owner, is lawful unless made before eleven o'clock at night.

If we assume that the rule does not apply to vested interests, it must be stated so as to destroy only contingent interests, and the following form is suggested:

All future interests which are limited to an unascertained person, or to take effect upon a contingency other than the regular termination of the preceding particular estate, are void whenever such person may possibly not be ascertained before, or the contingency may happen after, the expiration of a life or lives in being at the creation of the interest, and twenty-one years thereafter. It is believed, that this statement of the rule is clearer and more easily understood than the one suggested by Mr. Gray, and when borne in mind in this form, many difficulties in the subject will disappear.[8]

ROLAND R. FOULKE.

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[8] This is very much the language in which the learned author himself referred to the Rule (Gray, Restraints on Alienation, 2nd edit., sec. 272), where he said: "The Rule against Perpetuities declares that every estate or interest which requires the happening of a contingency or the arrival of a time certain as a condition precedent, is bad unless the contingency must happen or the time must arrive within a life or lives in being and twenty-one years."

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NOTES.

ACTIONS FOR DEATH IN THE ADMIRALTY COURTS.

At common law there was no right of action for injuries to the person resulting in death. The civil law doctrine, though not entirely clear, seems to have been the same in the case of a freeman.[1] Nevertheless, for several centuries nearly all the civilizations of the Continent of Europe have recognized the right to recover for death and have applied the rule both to casualties on land and at sea.[2] To remedy this defect of the

[1] *Hublin* v. *N. O. & C. R. R. Co.*, 6 La. Ann., 496. But see also *Holmes* v. *O. & C. R. R. Co.*, 5 Fed., 75.

[2] Hughes on Admiralty, sec. 110.

common law, Lord Campbell's Act[3] was passed, and similar statutes now exist in the various States of this Union. In England, however, it has, after some divergence of opinion in the courts, been settled that Lord Campbell's Act[3] does not apply to actions *in rem.* for injuries occurring on the high seas or within the jurisdiction of the High Court of Admiralty, and also that no such right of action for death exists under the general maritime law as in force in England.[4] For some time the decisions in the various Federal courts were in a hopeless conflict, some holding that there was no right of action for death under the general maritime law as in force in the United States, and others holding that such an action brought by the parent of the deceased would be entertained and recovery allowed, even in the absence of a State statute.[5] In "The Harrisburg,"[6] however, the United States Supreme Court definitely decided that the rule of the common law applied in the Admiralty, *i. e.*, a recovery for death, was no part of our maritime law. This decision has since been uniformly followed.[7]

Congress has never passed an act providing for the bringing of actions for injuries resulting in death, though it would certainly seem to have this power. The right to recovery in such cases being part of the general maritime law of the Continent of Europe, it would seem a proper subject for assimilation into our maritime law under the admiralty power granted the Federal Government in the Constitution.[8] It is, however, a well established principle that a State statute so intended can give a right *in rem.* enforceable in the Federal courts, provided that such right is maritime in its nature; *i. e.*, one over which the Federal Admiralty Courts would have cognizance.[9] It therefore becomes important to examine the various State statutes to see whether or not they give such a right of action. Statutes modelled on Lord Campbell's Act[3] have generally been held

[3] 9 and 10 Vict., c. 93.

[4] Vera Cruz, 10 App. Cas., 59.

[5] The Sea Gull, Chase 145; The Highland Light, Chase 150; The Manhassett, 18 Fed., 918.

[6] 119 U. S., 199.

[7] The Corsair, 145 U. S., 335; The Onoka, 107 Fed., 984.

[8] For a similar extension of the admiralty power of the Federal Courts in conformity with the general maritime law of the Continent of Europe compare the acts for the limitation of the liability of ship owners (Act of March 3, 1851; Secs. 4282-9 of the Revised Statutes of the U. S.; Act of June 26, 1884; 23 Statutes at Large, 57; Act of June 19, 1886; 24 Statutes at Large, 80).

[9] The Glide, 167 U. S., 606.

to give no right *in rem.* enforceable in the admiralty, and most of the State statutes have been of this character,[10] In a few cases where a right *in rem.* has been specifically provided for, it has been enforced in the Federal Courts.[11]

"The Corsair" [12] was a case where a libel *in rem.* was filed against the Corsair for negligence causing the death of a passenger. The claim was based on the Louisiana code providing for the bringing of actions for injuries resulting in death. The injury in question occurred in Louisiana waters. The United State Supreme Court held that the statute gave no right *in rem.* but intimated that an action *in personam* would have lain. In *Sherlock* v. *Alling* [13] and *American Steamship Co.* v. *Chase,*[14] actions *in personam* brought under a State statute providing for a right of action for death were entertained and recovery allowed in cases where the injury occurred within the waters of the State giving the right of action. This distinction between a suit *in rem.* and one *in personam* seems to have been followed in the recent case of the *Old Dominion S. S. Co.* v. *Gilmore.*[15] In that case the administrator of the deceased sued the owners of the Hannibal for injuries resulting in death, caused by a collision on the high seas between the Hannibal and the Saginaw—two vessels belonging to Delaware corporations. The court (per HOLMES, *J.*) applied the well-known admiralty principle that a vessel is part of the territory of the country whose flag she flies, and said that though the collision occurred on the high seas, it in law took place within the State of Delaware, both the vessels being owned by Delaware corporations, and hence part of the soil of that State. The court enforced the Delaware statute giving an action for death and allowed recovery.

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[10] The Corsair, 145 U. S., 335; The Sylvan Glen, 9 Fed., 335; The Manhassett, 18 Fed., 918; The Onoka, 107 Fed., 984. See Hughes on Admiralty, p. 209, note 6, for a complete list of the decisions on the various state statutes.

[11] The Glendale, 77 Fed., 906; 81 Fed., 633, construing sec. 2902 of the Virginia Code of 1887.

[12] 145 U. S., 335.

[13] 93 U. S., 99.

[14] 16 Wall., 522.

[15] U. S. Supreme Court Reporter (Advance sheets for Jan. 15, 1908, p. 133). [Case decided Dec. 23, 1907.]

Attacking an Erroneous Judgment by means of the Writ of Habeas Corpus.

An interesting discussion of the scope of the writ of *habeas corpus*, where it is sought to be used for the purpose of attacking an excessive or an erroneous judgment, is found in the case of *ex parte Burden*, recently decided by the Supreme Court of Mississippi, and reported in 45 Southern Reporter 1. Burden, the prisoner, had been indicted by the grand jury for "assault with intent and in the attempt, to kill and murder," and the verdict of the trial jury was,—guilty of "assault and battery with intent to commit manslaughter." The Circuit Judge, interpreting the verdict as a conviction for a felony, sentenced Burden to a term of six years in the penitentiary. He appealed to the Supreme Court, and pending the appeal, sued out a writ of *habeas corpus* before the Chancellor, alleging that the conviction was a nullity, or at most a conviction for assault and battery only, which was a misdemeanor and would entitle him to release on bail. The Supreme Court, in a carefully worded opinion by the Chief Justice, Whitfield, allowed the writ. They went on the ground that, as there was no such crime known to the laws of the State as that of which Burden was convicted, the words "with intent to commit manslaughter" must be treated as mere surplusage; that the Circuit Judge, in failing to do this and in sentencing the prisoner as for a felony, had exceeded his jurisdiction, and that the writ of *habeas corpus* will lie wherever a prisoner has been sentenced in excess of the jurisdiction of the court. They held, however, that the sentence did not render the verdict a nullity, and remanded the prisoner for a further commitment under the verdict of assault and battery.

The particular distinction which the Court drew in this case was that between a judgment erroneous in its essence, as this was, and one merely successive, as for a period of time longer than that permitted by statute. The former, they said, could be attacked in this collateral manner, the latter, only directly on appeal.

The question as to just when a court exceeds its jurisdiction in the imposition of a sentence is one on which the courts have differed decidedly. All have agreed that to sentence under a verdict which does not conform to any known law is erroneous; indeed, it was upon the authority of two earlier Mississippi

cases to that effect that *ex parte Burden* was decided.[1] But it has long been questioned whether, when the court has undoubted jurisdiction of the person of the accused, and also of the offence with which he is charged, a merely excessive sentence, one overstepping the statutory limit, will be held to have been given without jurisdiction, so that the writ of *habeas corpus* may be employed to attack it, or will be held to have been a pure error and only assailable on appeal. A number of courts have adhered to the latter view;[2] others have gone to the opposite extreme and declared the judgment void *ab initio*, and the prisoner discharged[3]—a lamentable failure of justice because of a technicality—while still others (and these seem to be in the majority) declare that only the excessive portion of the sentence is void, so that the prisoner may not be released upon *habeas corpus* until he has served out the valid period of his term.[4] "The prevailing rule is that an excessive sentence is merely erroneous and voidable; that the whole sentence is not illegal and void because of the excess; that it is not void *ab initio*, and that it is good on *habeas corpus* so far as the power of the court extends, and invalid only as to the excess."[5] The great New York case of *The People ex rel. Tweed* v. *Viscomb*, 60 N. Y., 559 (1875), in which the notorious Tweed, after having been convicted on twelve counts and sentenced separately under each, obtained his liberty after serving the term prescribed for the first, follows this rule, as does also the leading case in the United States Supreme Court, *ex parte Lange*, 18 Wallace, 163 (1873). Hence, the action of the Court in the Burden case in remanding the prisoner for a proper sentence, would seem to be sanctioned by the better authority.

It is interesting to note certain other irregularities which have been held to admit the remedy of *habeas corpus*. Where, for example, a statute provides a punishment of fine or imprisonment, and the Court sentences the prisoner to fine *and* imprisonment, he will be dischargeable under this writ as soon as he

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[1] *Gipson* v. *State*, 38 Miss., 295 (1860); *Traube* v. *State*, 56 Miss., 153 (1878).

[2] *In re Graham*, 76 Wisconsin, 366 (1890); *Sennot's Case*, 146 Mass., 489 (1888).

[3] *Ex parte Page*, 49 Mo., 291 (1872).

[4] *In re Bulger*, 60 Cal., 438 (1882); *Ex parte Cox*, 32 Pac. (Idaho), 1971 (1893); *In re Fanton*, 55 Neb., 703 (1898).

[5] Church, "The Writ of Habeas Corpus;" sec. 373 (1893).

has paid the one or the other penalty.[6] Similarly where the Court adds a penalty, of its own motion, to that prescribed by law, such as the addition of the words "at hard labor,"[7] the writ of *habeas corpus* has been allowed; and always where the record shows the verdict to have been irregularly rendered, as by eleven jurors.[8] Generally speaking, however, the courts are very jealous of this remedy, and it has even been refused in a case in which a penitentiary sentence was imposed for an offence punishable only in the county jail,[9] the Supreme Court of South Carolina declaring this a clear case for a remedy by appeal. This particular decision would seem to be a questionable one from the standpoint of jurisdiction, but it represents the extreme reluctance of many courts to permit a collateral attack upon the judgment of a trial Judge. English courts, says Mr. Church, are particularly conservative in this respect.

There was a strong dissent delivered in *ex parte Burden* by Mr. Justice MAYES, based upon the proposition that the Circuit Judge was forced to construe an ambiguous verdict, and that a sentence imposed upon his interpretation thereof, even though erroneous, could not be assailed in this manner. This position is sustained by the decision of the Supreme Court of the United States in the case of *in re*, Eckhart, 166 U. S., 481 (1896), and under the reasoning in that case would seem to be sound, if we admit the verdict to be ambiguous. But it can hardly be said that a verdict of "assault and battery with intent to commit manslaughter" is an equivocal conviction, manslaughter being the form of homicide in which the element of intent is not found.

The decision of the majority of the court appears to be sound on principle and in consonance with the authority of the most carefully considered cases, and constitutes one more step toward uniformity in the application of the principles of justice in this somewhat confused domain of the law.

EMPLOYERS' LIABILITY ACT.

This Act (34 Stat. at L. 232 chap. 3073) was declared unconstitutional by the Supreme Court of the United States in

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[6] *In re Bonner*, 151 U. S., 242 (1893); *U. S.* v. *Pridgeon*, 153 U. S., 48 (1893).

[7] *Ex parte Kelly*, 65 Cal., 154 (1884).

[8] *Scott* v. *State*, 70 Miss., 247 (1892).

[9] *Ex parte Bond*, 9 S. Car., 80 (1877).

the recent case of *Howard* v. *Illinois Central Ry. Co.* (decided January 6, 1908). A majority of the court held that the act applied to intrastate commerce as well as interstate commerce, and based the invalidity of the Act on this ground. Of the justices concurring in the result of the opinion delivered by Mr. Justice WHITE, three were "not prepared to agree with all that is stated as to the power of Congress to legislate upon the subject of the relations between master and servant"—these were the Chief Justice and Justices BREWER and PECKHAM. The remaining justices affirmed the power of Congress to alter the fellow-servant rule.

The reasoning upon which this power was sustained is found in the opinion of Mr. Justice WHITE and in the dissenting opinion of Mr. Justice MOODY. The control of Congress in this matter is derived from the power to "regulate commerce with foreign nations and among the several States and with the Indian tribes;" and it is asserted that the power is "nothing less than the whole power which any government can properly exercise over either" (subject to the general restrictions imposed by the Constitution). The previous inaction of Congress is not an implication against the existence of the power, because the regulation of marine commerce had until some forty years ago absorbed the attention of that body. The test of the existence of the power in any given case is not merely the matter regulated, but whether the regulation of such matter is a regulation of interstate commerce; thus the relation of master and servant comes within the scope of Congressional regulation, when that relation directly affects interstate commerce.[1] The present subject is within this principle, since it is of primary importance in the conduct of interstate commerce that regard should be had for the safety of those engaged therein. Moreover, the power of Congress to regulate the relation of master and servant in matters directly affecting interstate commerce is supported by precedent; for in many cases it has been held that a State could affect this relation under such circumstances providing Congress had not acted, thus implying that Congress

[1] Cases are cited showing that the power of Congress to regulate commerce extends to persons as well as goods.

"Congress may legislate as to the qualifications, duties and liabilities of employees and others on railway trains engaged in that (interstate) commerce." Field, *J.*, in *Nashville Railway* v. *Alabama*, 128 U. S., 96. See also statements of Mr. Justice Harlan to effect that Congress could regulate "the whole subject of the liability of interstate railroad companies for the negligence of those in their service," in *Pierce* v. *Van Dusen*, 78 Fed., 693.

had the power to act;[2] and also that the safety-appliance act—the constitutionality of which has been sustained by this court—is a regulation of the relation of master and servant in connection with the rule of *"volenti non fit injuria."*

The second point involved—the decision of which differentiates the majority and minority opinions—is whether the Act was intended to apply to intrastate as well as interstate commerce. This was the only mooted question, for it was conceded by all, that if the Act purported to include intrastate commerce, that it was unconstitutional. It was, moreover, admitted that if such was the intent of the Act that the court could not give the Act a narrower meaning;[3] nor could the Act be saved in so far as it applied to the District of Columbia and the Territories, for the provisions of the Act were "single and incapable of separation."

The grounds upon which the majority concludes that the intention of Congress was to embrace intrastate commerce were: that the words of the first section of the statute clearly manifested such an intention, in that the Act was to apply to "every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several States, etc.;" and that in defining the servants to which the Act should extend, the words used are "*any* of its employees" (italics not in the statute).

We pass to the reasoning of the minority opinion. The presumption is in favor of the validity of an act of Congress, and "every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."[4] The enumeration of territorial, interstate and foreign commerce and the omission of the internal commerce of the State, show that Congress was conscious of its limitations and inteded not to exceed them.[5] Regarded from this standpoint, the words "any of its employees" applies to any of its employees while engaged in interstate commerce.[6]

Several minor points were raised against the unconstitu-

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[2] *Smith* v. *Ala.*, 124 U. S., 465.

[3] Trademark Cases, 100 U. S., 82.

[4] Waite, *C. J.*, in Sinking Fund Cases, 99 U. S., 700, at p. 718.

[5] Marshall's, *C. J.*, remarks as to the scope of the interstate commerce clause are cited as applicable to the construction of this statute. "The enumeration presupposes something not enumerated; and that something, if we regard the language * * * must be the exclusively internal commerce of the state." *Gibbon* v. *Ogden*, 9 Wheaton, 194, 195.

[6] A striking parallel is made between the present case and the case

tionality of the statute, which are not passed upon in the opinion, announcing the decision of the Court, although with one exception they are summarily disposed of in the opinion of Mr. Justice Moody. That exception is the provision of the statute "forbidding the employee to make a contract releasing his employer from the consequences of his negligence." On this question Mr. Justice Moody does not pass, but states that, being a separable provision, the determination of its validity cannot affect the decision of the case before him, which arises under other provisions of the Act.

Recovery for Damages for Mental Suffering in Tort and in Contract.

The right to recover for damages for mental suffering, in actions arising *ex delicto* and *ex contractu*, is a question in the law concerning which there is a diversity of judicial opinion.[1] There is an apparent reluctance to grant recovery in such cases, due chiefly, perhaps, to the difficulty of definitely ascertaining the true measure of damage from a pecuniary point of view.[2]

In actions arising *ex delicto* the weight of authority is in favor of a recovery for anguish of mind, but the right is limited to three well defined classes of cases, viz., first, where some physical injury has been inflicted;[3] second, where the plaintiff has been subjected to personal indignity, as in defamation, malicious prosecution, or seduction;[4] and third, where a

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of *McCullough* v. *Virginia*, 172 U. S., 102. Mr. Justice Brewer's language is cited: "However broad and general its (a statute's) language it cannot be interpreted as extending beyond those matters which it was within the constitutional power of the Legislature to reach," p. 112. Note, however, that the statute there referred to was a state statute. It would seem that such statutes are more leniently treated than acts of Congress in that the mere fact that on their face they apply to objects in general, some of which are outside the power of state control, invadidates them only *pro tanto;* the explanation, perhaps, is that the Federal Government, in contradistinction to that of the state, is a government of limited powers.

[1] See *Beaulieu* v. *Great Northern Ry. Co.*, 114 N. W. Rep. (Minn.), at p. 353 (Dec. 27, 1907).

[2] *Ibid.*, at p. 355.

[3] 8 Am. and Eng. Enc. Law, 658; Cent. Dig. (Am. Ed.), vol. 15, Col. 1756, sec. 100.

[4] 8 Am. and Eng. Enc. Law, 668; Cent. Dig. (Am. Ed.), vol. 15, Col. 1756, sec. 100.

clear legal right of the plaintiff has been invaded in such a wilful or malicious manner as would naturally cause mental distress, regardless of the preceding elements of physical injury or personal indignity.[5] It does not follow, however, that this is a proper element of damage in all tort actions, and it has been held that there could be no recovery for mental suffering which resulted to a mother from the death of a child by a wrongful act;[6] nor for libeling the dead;[7] nor for mere fright resulting in a nervous disorder;[8] nor for anxiety for safety of one's self or family during a blasting operation;[9] nor from threats or duress by means of which property was unlawfully procured.[10] The better rule would seem to be that recovery for mental pain in this class of cases is restricted to those in which there is an accompanying invasion of a legal right, physical bodily injury, malice, insult or inhumanity.[11]

As a general rule, pain of mind is not a subject of damages in actions arising *ex contractu*, except where the breach of a contract amounts in substance to an independent, wilful tort.[12] Exceptions to the general rule are actions for breach of promise to marry,[13] and actions against carriers for wilful or malicious injuries to passengers, in violation of their contract to carry safely.[14] The great weight of authority is against a recovery for mental suffering through failure to deliver telegrams.[15] Some courts, however, hold *contra*, in accordance with the so-called "Texas doctrine."[16] Where this doctrine has been followed it has been adhered to consistently, and an extreme case is found in North Carolina,[17] where recovery was allowed for fright and worry incident to a father's failure to meet his young daughter at a railroad station, because of the non-

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[5] *Lesch* v. *Railway Co.*, 97 Minn., 503 (1906).

[6] *State, Coughlan* v. *Railway Co.*, 24 Md., 84 (1865).

[7] *Bradt* v. *New Nonpareil Co.*, 108 Iowa, 449 (1899).

[8] *Porter* v. *D. L. & W. R. R. Co.*, 73 N. J. Law, 405 (1906).

[9] *Wyman* v. *Leavitt*, 71 Me., 227 (1880).

[10] *Wulstein* v. *Mohlman*, 57 N. Y. Super. Ct., 50 (1889).

[11] *Morse* v. *Duncan*, 14 Fed. Rep. (C. C.), 396 (1890).

[12] See *Beaulieu* v. *Great Northern Railway Co.*, *supra*, at pp. 354, 355; *Wilcox* v. *R. R. Co.*, 8 U. S. App., 118 (1892).

[13] *Coll* v. *Wallace*, 24 N. J. Law, 291 (1854).

[14] *Craker* v. *Railway Co.*, 36 Wis., 657 (1875).

[15] See *Beaulieu* v. *Great Northern Railway Co.*, *supra*, at p. 354.

[16] *Ibid.*, at p. 355; Cent. Dig. (Am. Ed.), vol. 15, Col. 1759, sec. 105.

[17] *Green* v. *Telegraph Co.*, 136 N. Car., 506 (1904).

delivery of a telegram advising him of her arrival there at a scheduled hour, and the terror which ensued during a lonely ride at midnight to her home.

Recovery has also been allowed for mental pain resulting from the mutilation of a dead body;[18] from the breach of contract to carry a dead body safely, where such breach constituted a wilful tort;[19] and from the breach of contract of an undertaker to keep safely the body of a dead child.[20] The Supreme Court of Minnesota, however, has recently refused a recovery for mental distress where a railroad company negligently failed to carry a dead body to its destination according to the usual train schedule, the delay interfering with the funeral plans and causing anxiety, humiliation and other anguish of mind.[21] The case holds that the facts establish a breach of contract only, and in the absence of a wilful tort incident to such breach, mental suffering is not an element of damage. It would seem to be in exact accord with the general rule, and commends itself to the legal mind as a sound view of the question involved. The subject is thoroughly reviewed, and the authorities fully stated, in the opinion of the Court.

The Scope of the Remedy of Discovery.

The usefulness of a bill of discovery in eliciting evidence to forward the ends of justice and render more difficult the successful perpetration of fraud is illustrated in a case recently decided by the United States Circuit Court for the District of Kansas. The case is that of the *Mutual Life Insurance Company of New York v. Griesa et al.*, 156 Fed. 398. One Perkins, who had taken out a policy with the complainant company for $100,000, in addition to several other policies aggregating nearly a million dollars with other companies, had been killed by accidentally falling from the roof of his house, shortly after having paid the first premium on the policy. The circumstances accompanying the accident were highly suspicious, pointing to a deliberate suicide; indeed, the coroner thought that such was the case. Perkins had purchased mor-

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[18] *Larson* v. *Chase*, 47 Minn., 307 (1891).
[19] *Lindh* v. *Railway Co.*, 99 Minn., 408 (1906).
[20] *Reinhan* v. *Wright*, 125 Ind., 536 (1890).
[21] *Beaulieu* v. *Great Northern Ry. Co.*, *supra*.

phine the day of his death; his eyes showed effects of morphine poisoning; and the doctor who examined him hinted at such a cause. He was, however, buried without any examination having been made on the part of the insurance companies. There was a clause in complainant's policy which prevented recovery if death occurred through suicide within two years from the payment of the first premium; a clause to which Perkins had strongly objected, but which he had finally accepted under protest. When action was brought against the complainant for the insurance, this bill was filed petitioning the court to grant an order to have the corpse exhumed and examined by physicians for traces of morphine poisoning. Mr. Justice McPherson granted the order, reviewing the authorities with care, and announcing that in such a case, where the ends of justice required it, and where a possible fraud was to be guarded against, no questions of delicacy should enter into the case; adding dryly that such arguments certainly would not have been advanced had it been necessary to take such a proceeding for the executor to obtain the money.

The case is a novel one in the length to which it goes, though by no means and illogical conclusion, considering the development of the usefulness of this form of relief during the past century. Originally, as is well known, the bill of discovery lay only when books or documents material to the cause were wholly in the control of one of the parties, and the other could show the court that the evidence they contained was a necessary link in the framing of his action.[1]

There soon arose analogous cases, however, in which this form of producing evidence was the only adequate one. "In chancery, under the same wholesome principle and practice by which bills of discovery were allowed for ascertaining the opponent's testimony and the documents in his possession, the inspection of chattels and premises in his possession or control was obtainable wherever fairness seemed to demand it."[2] Hence we find Lord Eldon allowing the bill in 1815, where an injunction was asked for to restrain the infringement of a patent, and the inspection desired was of the machine in which the alleged piracy was worked out;[3] and again, in 1819, in the case of *Kynaston* v. *The East India Co.*, 3 Swanston 248, where the petition asked for an order of inspection of certain houses

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[1] Pomeroy, Equity Jurisprudence, Sec. 191.

[2] 3 Wigmore's Evidence, Sec. 1862.

[3] *Bovill v. Moore*, 2 Cooper's Chan. cases 56 (1815).

in order to determine the value of the titles to which the plaintiff was entitled.

The examination has been most frequently allowed, both in England and the United States, in mining cases, where there was a dispute as to the boundary, or as to the amount of mineral extracted from the plaintiff's mine by the adjoining owner, and a survey was desired.[4] In *Reynolds* v. *Burgess Sulphite Fibre Co.*, 71 N. H. 332 (1902), Judge Chase, of the Supreme Court of New Hampshire, in a well-reasoned opinion, allows the bill where an inspection of a machine is asked by the administratrix of a workman who was killed by reason of a defect in it, the principal action being one in tort for the death. Cases in some jurisdictions have gone the other way, notably in New York,[5] where the Code Practice seems to be an obstacle, and in Michigan,[6] where the order was refused; in each case, however, upon some other than the jurisdictional ground. But the general law in this country, as well as in England, seems to be that a bill of discovery will be allowed where the evidence sought is contained in property within the defendant's control, whether that property be books, documents, chattels or real estate. All that the plaintiff need show is a definite interest, an interest which, in the language of Story (Equity Jurisprudence, Sec. 1493a) "will, if he is plaintiff at law, constitute a good ground of action, or, if he is the defendant at law, show a good ground of defense, in aid of which the discovery is sought." And in cases of doubt, he adds, the court will grant the discovery, and leave the court of law to adjudicate upon the legal rights of the parties.

There is considerable conflict as to whether discovery should be allowed in one class of cases: those in which it is sought to compel a witness to permit his person to be examined, in order to determine the extent of an injury. The Supreme Court of the United States, in *Union Pacific R. R.* v. *Botsford*, 141 U. S., 250 (1890), refused to grant such an order, holding it a violation of the natural right of every man to the inviolability of his person," though later, in a case brought in a jurisdiction where a statute provided for such examination, they admitted that the Federal Courts should recognize the

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[4] *Henszey* v. *Langdon-Henszey Coal Min. Co.*, 80 Fed. 178 (1897); *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 80 (1869); *Thomas Iron Co.* v. *Allentown Mining Co.*, 28 N. J., Eq. 77 (1877).

[5] *Ansen* v. *Tuska*, 1 Robertson (N. Y), 663 (1863).

[6] *Newberry* v. *Carpenter*, 31 L. R. A. 163 (1895); *Martin* v. *Elliott*, 31 L. R. A. 169 (1895).

statute.[7] The very existence of such legislation would indicate that the tendency of the law is to compel a party to submit to such inspection, or else forfeit his right to the benefit of the law, and such seems to be the case.[8]

The writer has succeeded in finding only one other case in which the bill was brought for the same purpose as in the *Insurance Co.* v. *Gricsa*. That is the case of the *Grangers' Life Insurance Co.* v. *Brown*, 57 Miss. 308 (1829), in which the court refused the order on the ground that the facts were not strong enough to warrant it. "We are not prepared to say," the opinion reads, "that in a proper case the court, in the interests of justice, should not compel the exhuming and examination of a dead body which is under the control of the plaintiff, if there is a strong reason to believe that without such examination a fraud is likely to be accomplished, and the defendant has exhausted every other method known to the law of exposing it. We are prepared to say, however, that such an order should be made only upon a strong showing to that effect."

Under the facts as shown in the report there was as much reason to grant the bill here as in the Griesa case, and the failure of the court to do so can only be explained by the fact, as shown by the portion of the opinion quoted, that the principle that discovery may be cumulative is not recognized.

It is true that there was a time when the auxiliary bill of discovery was constantly and often needlessly presented, as an easy means of obtaining valuable evidence, and hence the United States Supreme Court decision in *Brown* v. *Swann*, 10 Peters, 497 (1836), denying the bill where the facts may be proved in any other way. But the practice has changed so materially that this rule is no longer necessary, and *Brown* v. *Swann* may be said not to represent the general law.[9] Discovery will not be refused because the same facts can be proved by other testimony, but discovery will be granted in order to confirm or even to dispense with such other proofs.[10]

The authorities seems to present no valid reason why such a case as this should not have been decided long ago. Indeed,

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[7] *Camden & Suburban Ry. Co.* v. *Stetson*, 177 U. S. 172 (1899).

[8] *Dimenstein* v. *Reichelson*, 34 W. N. C. (Pa.) 295 (1903); *Graves* v. *Battle Creek*, 95 Mich. 266.

[9] *Earl of Glengall* v. *Frazer*, 2 Hare, 99; *Peck* v. *Ashley*, 10 Met. (Mass.) 478; *Vance* v. *Andrews*, 2 Barb. Ch. (N. Y.), 370, 2 Story Equity, Sec. 1483. Pomeroy, Equity Sec. 196.

[10] Merwin, Equity and Equity Pleading, Sec. 854.

aside from the question of delicacy, which has doubtless oftentimes stopped the proceeding in its inception, the grounds for denying the bill are slighter here than elsewhere, for such refusal is most frequently based on the argument that to grant discovery would be to violate a property right, and no one has a property right in a buried corpse.[11] The decision is an interesting one, particularly in the light of the recent proceedings in England in the matter of the Druce succession.

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[11] 2 Blackstones' Commentaries, 429.

RECENT CASES.

COMMON CARRIERS.

Goods consigned to plaintiff by way of the defendant express company, arrived at their destination, an unimportant station, where the usage was to notify the consignee of their arrival instead of personally delivering them. The defendant's agent sent no notice to the plaintiff. Plaintiff's goods were stolen the same day he would have received notice of their arrival, had any been sent. *Held*, that as the negligence in not sending the notice was not the proximate cause of the loss, the Court assuming that the consignee, because of the inclement weather, would not have gone for the package had notice been sent, defendants are not liable. *Hutchison* v. *Express Co.*, 59 S. E., 949. An ordinary common carrier is responsible for goods carried, only as warehouseman after they have been at the point of destination a reasonable time. *Fenner* v. *R. R.*, 44 N. Y., 505. And some courts hold that not even notice of the arrival by the common carrier to the consignee is necessary. *Norway Co.* v. *R. R.*, 1 Gray, 263. Upon an express company, however, there is the duty laid of personal delivery, and until such delivery it is held as insurer. *American Express Co.* v. *Wolf*, 79 Ill., 430. This duty may be dispensed with by custom and usage at unimportant stations and replaced by the duty of mere notice to the consignee; but the express company is held strictly liable to give such notice in order to be relieved of its liability as insurer. *Witbeck* v. *Holland*, 45 N. Y., 13. As there was no notice given in the principal case, irrespective of whether it would have been acted on or not, it is submitted that the defendant was not relieved of its liability as insurer, and the doctrine of proximate cause on which the Court based its opinion should not have been considered at all.

Express Companies: As Insurers

CONSTITUTIONAL LAW.

The personal representative of D brought an action *in per-*

CONSTITUTIONAL LAW (Continued).

Tort on High Sea: Liability Under State Statute

sonam against B for the death of D in a collision on the high sea between the vessels of B and C, corporations located in Delaware, a State statute of which permits such an action by the personal representative of the deceased. Holmes, *J.*, *held*, that such a statute is not repugnant to the admiralty or commerce clauses of the Federal Constitution, and will be enforced as a case within the common law jurisdiction, which State statutes may control in the absence of federal legislation on the subject. *Old Dominion Line* v. *Gilmore*, U. S. Adv. Sheets, Jan. 15, 1908, p. 133.

Such an action for a maritime tort under the State law was doubted in *Butler* v. *Boston*, 130 U. S., 527; but has been since definitely established in The Corsair, 145 U. S., 336; *McDonald* v. *Mallory*, 77 N. Y., 546; and the City of Norwalk, 55 Fed. 98 (N. Y.).

CONTEMPT.

Publication of Decision

The Supreme Court of Rhode Island adjudged B in contempt for incorrectly publishing the decision of the Court, and making adverse criticisms thereon without disparaging the integrity of the Court. B pleaded that the misstatement was not intentional and the criticism not on a cause then pending. The Court *held*, that as the decision was far-reaching, such a misstatement could not be published with impunity. *In re*, Providence Journal Co., 68 Atl. 428.

Under this opinion, there would appear to be liability for any misstatement of the law whether made in the press or on the forum, whether the cause be then pending or not. At common law, one might be adjudged in contempt (1) for scandalizing the Court itself; (2) for abusing the parties concerned in the cause, or (3) for prejudicing mankind against persons concerned before the cause is heard. *Roach* v. *Garvan*, 2 Athyns, 471. This common law doctrine has been followed in some States, as in Morrill's Case, 16 Ark., 384, and Burdett's Case, 103 Va., 838; but the principal case can hardly be brought within those cases.

The general American doctrine is that no matter how defamatory of the court or the judge a publication may be, it cannot be regarded as contempt unless it be written and published with reference to a cause then pending before the court. *Ex parte*, Green, 81 S. W. (Tex.), 723; *Fellman* v. *Mercantile*, 116 La., 723; *Stuart* v. *People*, 4 Ill., 395.

CRIMINAL LAW.

The accused was informed against for robbery. The information was insufficient to charge that offense, but did charge larceny. He was tried, convicted and sentenced for robbery. *Held*, the accused, having been once in jeopardy for the offence of larceny under such information, could not be again tried therefor after reversal of the erroneous conviction of robbery. Court of Appeal of California in *People* v. *Ho-Sing*, 93 Pacific, 204.

Former Jeopardy

In *Floyd* v. *State*, 96 S. W., 125 (Ark.), the defendant was discharged on an indictment of robbery, because he had been fined before a magistrate for petit larceny based on the same facts. The Court say, "As a charge of robbery includes larceny," the defendant on the indictment of robbery would be on trial for an offense for which he had already suffered punishment.

In *Bowen* v. *State*, 106 Ala., 178, the indictment charged burglary, the jury found defendant guilty of larceny, the Court reversed the finding, because of failure to allege ownership of the property, but *held* he could be tried again for larceny.

A was convicted and sentenced for the crime of obtaining money by false pretenses in the United States Court in China, which was created by Act of June 30, 1906. The Court has jurisdiction over offenses against the laws of the United States, and when these are deficient to furnish suitable remedies, then in accordance with the common law. *Held*, the statute 30 Geo. II (1757), making this act a crime having been passed prior to the separation of this country from England, is an offense at common law within the meaning of the Act of 1906; *Biddle* v. *U. S.*, 156 Fed., 759.

Jurisdiction: United States Court for China

In several States, English statutes passed prior to July 4, 1776, have been held to be in force.

In other States, only statutes passed prior to 4 James I (1607) are considered as part of the common law. 6 Am. & Eng. Encyc., 278 (2nd ed.).

DAMAGES.

In *Beaulieu* v. *Great Northern Railway Company*, 112 N. W.

DAMAGES (Continued).

Mental Suffering in Tort and Contract

Rep., 353 (Dec. 27, 1907), the Supreme Court of Minnesota exhaustively reviews the subject of mental suffering as an element of damage in actions arising *ex delicto* and *ex contractu*, and cites the authorities *in extenso*. In this case the plaintiff's child died at Cass Lake, and was shipped over the road of the defendant company to Ogalmah, where it was to be buried. It was necessary to transfer the body to a connecting line at Erskine. The defendant, however, carried the body past this point, and as a result of the negligent act, the plans for the funeral were delayed and the plaintiff suffered great mental anguish. The Court *held*, that the acts complained of constituted a mere breach of contract, and not being accompanied by any independent, wilful tort by the defendant, the plaintiff was not entitled to recover except for nominal damages.

EQUITY.

Unfair Competition: Relief by Injunction Refused

The complainant had for years placed on the market under the trade name of "Enterprise," a machine and its parts on which the patent had expired. He had a general reputation as the manufacturer of other articles under that name. The defendants manufactured parts of the same machine and packed them in boxes similar to the complainant's marked: "Repair Parts of the Enterprise Meat Chopper" manufactured by the defendants. There were no *indicia* on the parts to show their origin. An injunction prohibiting the defendant from making or selling the articles without distinguishing them from the complainant's was refused; *Bender* v. *Enterprise Co.*, 156 Fed., 641.

Relief is granted where the machine is simulated and placed on the market with no differentiating marks. *Singer Mfg. Co.* v. *Just Mfg. Co.*, 163 U. S., 169. This is on the ground of the confusion caused among the public which results in a detriment to the plaintiff's established business. *Flagg Mfg. Co.* v. *Holway*, 178 Mass., 83.

In *Neostyle Mfg. Co.* v. *Ellan's Duplicator Co.*, 21 C. P. C., 185, an injunction was refused in a situation similar to the present. The case nearest in point in America is *Deering Harvesting Co.* v. *Whitman*, 91 Fed., 376, in which the parts were advertised and catalogued as manufactured by the complainant. It is needless to add the defendant was restrained.

EQUITY (Continued).

The Court in the present case refused a further extension of the above case for the reasons: (1) that the assumption ordinarily is not that the parts are manufactured by the maker of the machine itself; (2) that to grant the complainant's prayer in requiring the defendants distinctly to ear-mark their product would have a deterrent effect upon the trade in repair parts.

FIXTURES.

Unlawful Attachment

A wrongfully attached B's two-room frame dwelling house, which was then a chattel, to land belonging to A, and then conveyed the land and house to C, who had no notice of B's rights. *Held*, the house did not become a part of the realty as between B. and C. Supreme Court of Montana in *Eisenhauer* v. *Quinn*, 93 Pacific, 38.

Most of the cases concerning fixtures in which the rights of innocent purchasers have come in question, have been cases where the chattel has been attached with the consent of its owner under an agreement that it is to remain personalty. In these cases an innocent purchaser of the realty is permitted to retain the chattel against the owner. Bronson on Fixtures, 155 and cases cited. The contrary has been held, however; *Russell* v. *Richards*, 10 Me., 429.

The ground of the majority view is that the owner of the chattel has put it in the power of the owner of the realty to sell it with the land to an innocent purchaser; *Wicher* v. *Hill*, 115 Mich., 333; *Davenport* v. *Shants*, 43 Vt., 546.

The decision of the principal case where the attachment was made without the consent or fault of the owner seems in accordance with this principle.

HABEAS CORPUS.

Attacking Erroneous Judgment

In *ex parte Burden*, 25 Southern Reporter 1, the Supreme Court of Mississippi, granted a writ of *habeas corpus* to a prisoner who had been sentenced as for a felony, under a verdict of "assault and battery with intent to commit manslaughter," when there is no such crime known in the law, the words "with intent to commit manslaughter," which the trial Judge considered as indicating a felony, being mere surplusage.

See note page 255.

HOMICIDE.

B, boarding with C, placed a spring-gun in his trunk in such a manner as to kill C who, in curiosity and without right, sought to open the trunk, though warned by B as to the condition. *Held*, that one has no greater right to take life by indirect than by direct means under the same circumstances; that warning to C was no defence to the charge of murder unless it were brought home in such a way that her act was a deliberate attempt to take her own life; but if C was the only person who might rightfully go to the room, evidence of the warning is admissible as having a material bearing on the question of malice; that proof of the specific intent not to kill C is not admissible, since his intent was necessarily general until made specific by C's death, so evidence of his intent must be equally general; *State* v. *Marfaudille*, 93 Pac. (Wash.), 939.

Spring-Guns: Warning: Intent

On the question of notice, this case goes beyond that held in *United States* v. *Gilliam*, Fed. Cases No. 15205a, where it was *held*, that where notice is given, the sufferer is held to have brought the calamity on himself—to be his own executioner if life is lost. The other doctrines of the leading case are in line with the few cases which have arisen in America. Wharton on Homicides, 418, 553; *Simpson* v. *State*, 59 Ala. 1; *Gray* v. *Combs*, 7 J. J. Marsh, 428.

The old English common law on this subject as declared in *Ilott* v. *Wilkes*, 3 B. & Ald., 304, has not been adopted into the common law of this country. *State* v. *Moore*, 31 Conn., 479.

INNKEEPERS.

Plaintiff, stopping at the "Imperial Hotel," at a summer resort, and the rate being fixed by the week, but for no specified time, brings this action for property taken from her room. *Held*, that defendant proprietor was an innkeeper and liable to the plaintiff guest for any loss not induced by the latter's contributory negligence. *Holstein* v. *Phillips*, 59 S. E., 1037. The absolute liability of innkeepers for any loss not occasioned by the contributory negligence of the guest has long been settled. *Bac. Abr. Inns and Innkeepers C.* 4. That there is a difference between a boarding house and an inn and that the latter's proprietor is liable only for the

Boarding House Keepers: Distinction Between in Regard to Liability for Theft

INNKEEPERS (Continued).

losses occurring through his own negligence or that of his servants, is equally well established; *Parker* v. *Flint*, 12 Mod., 254. An inn may quarter one as a "boarder," and conversely a boarding house may quarter one as a "guest;" *Kister* v. *Hildebrand*, 9 B. Mon., 72, and in each case the liability of the proprietor is determined by the character of the resident. A place is not conclusively an inn because it is called "hotel;" *Bonner* v. *Welbron*, 7 Ga., 296; nor is it conclusively a boarding house because the charge is made by the week; *Betts* v. *Salisbury*, 12 Alb., L. J., 337. As the old reasons for holding innkeepers to such strict requirements have passed away, and as the trend of the law is to free them from the old liabilities, a case so closely on the line as the principal case might well have gone the other way.

NEGLIGENCE.

Highways: Liability of Persons Causing Obstructions

Defendant owned a pile of wood, one corner of which extended over the highway, though not the travelled portion, for about two feet, but there was left sufficient room in the highway for the ordinary use thereof. While plaintiff's wife was driving along the road, the horse became frightened by a train, and started to run. When the wood pile was reached, the buggy struck the part extending into the highway, and was overturned, and plaintiff was thrown with such violence as to cause her death.

There was held to be no error in the refusal of the Court to instruct the jury that, as a question of law, the fact that the wood pile was "off the main traveled portion of the highway and at a place where it was not dangerous to persons driving along said highway in the customary and ordinary manner," exculpated defendant from all blame and responsibility for the accident and its consequences; *Williams* v. *San Francisco & N. W. Ry. Co.*, 93 Pac., 122.

While the cases appear to be widely divergent upon the application of principles of law involved in the principal case, whatever apparent difference there may be in the conclusions reached is founded upon a distinction made clear by the Court, as follows: "And while, as between the town or county or public authorities having supervision of public highways and the traveler, the latter will leave the portion of the road laid

NEGLIGENCE (Continued).

out and prepared for the customary use and travel, and go upon and use the unprepared and customarily unused part at his own risk, he is nevertheless entitled to the unobstructed and uninterrupted use of the entire width of the highway as against the unlawful acts of other persons, either real or artificial."

In *Dickey* v. *Maine Telegraph Co.*, 46 Me., 485, it was *held:* "The duty of others is to abstain from doing any act by which any part of the highway would become more dangerous to the traveler than in a state of nature, or than in the state in which the town has left it." In another case it was said, "It is a mistake to suppose the public rights of travel are restricted to the prepared and usually traveled path." *Johnson* v. *Whitfield*, 18 Me., 286; 36 Am. Dec., 721.

There is a well recognized rule that an owner of property abutting upon a road has a right temporarily to occupy a reasonable portion of the road with building materials, provided that sufficient room is left for the passage of persons traveling; *Palmer* v. *Silverthorn*, 32 Pa., 65. However, the justification of such actions lies in necessity, an element not present in the principal case; *Smith* v. *Simmons*, 103 Pa., 32.

Plaintiff was injured through the breaking of a "head-piece" of an elevator which his employer was renting from the defendant. Plaintiff sues defendant for damages. There was no proof that defendant was bound to inspect and repair the elevator or that he was under any obligation beyond that of furnishing an elevator safe and suitable for the purposes to which it was to be put. There was no evidence that the "head-piece" was defective or unsafe when installed. Recovery was allowed in the lower court. Scott, J., in reversing the decision because of error in instructions as to defendant's liability, said: "It was undoubtedly the defendant's duty in the first instance to furnish an elevator which was safe and suitable for the uses to which it was to be put," but, "beyond this, in the absence of a special agreement, it was under no obligation to inspect or repair." *Haigh* v. *Edelmeyer & Morgan Rod Elevator Co.*, 107 N. Y. Sup., 936.

Persons Liable: Liability of Lessor of Machinery

This statement seems to infer that, had a contract existed between the plaintiff's employer and the defendant, and there had been a breach of contract by the latter in not properly

NEGLIGENCE (Continued).

inspecting, the plaintiff could have recovered. This inference accords with the dictum of the early New York case of *King* v. *R. R.*, 66 N. Y., 181, decided in 1876, that, "If there was a duty resting upon the defendant (lessor) to keep the derrick in repair, so that it could be safely used, it may be conceded that the omission of this duty would give a right of action to the plaintiff (an employee of lessee) for an injury caused thereby," thus showing that in New York the question of the right of an employee of a lessee to recover from a lessor damages for injuries resulting from breach of contract to inspect and repair machinery entered into by the lessor with the lessee, is still an open one.

The general law is well established to the contrary, as laid down in the kell-known case of *Winterbottom* v. *Wright*, 10 M. & W., 107, and followed in the recent case of *Earl* v. *Lubbock*, 1 K. B., 253 (1905). These cases restrict the plaintiff's action, in such a case as this, to one against his employer, holding that the contract between his employer and the lessor does not entitle the employee of the lessee to an action against the lessor.

Master and Servant: Dangerous Premises: Duty of Master

Defendant, an operator of a stone quarry, was held liable in damages for personal injuries resulting from negligence in not properly inspecting the rocks blasted in the quarry so as to prevent danger from unexploded charges to workmen employed to reblast the rocks. The defendant pleaded assumption of risk. The evidence showed that it was the rule in quarries that the foreman should provide means by which all unexploded charges could be found—numbered—and exploded before the workmen employed to reblast the rocks should begin work. The plaintiff, being advised of this rule, worked in reliance upon it, and was injured by the explosion of a hidden charge. *Harper* v. *Iola Portland Cement Co.*, Sup. Ct. of Kansas, 93 Pac., 179.

This case accords directly with *Brick Co.* v. *Shanks*, 69 Kansas, 306, in holding that "The defendant expressly undertook to make the place where the plaintiff was required to work, safe by the adoption of the regulation described, and an implied agreement to assume the risk guarded by the regulation cannot be recognized."

POWERS OF POLICE DEPARTMENT.

Bertillion System of Measurement: Mandamus

The plaintiff was indicted for grand larceny and forgery, and while waiting in the district attorney's office for his arraignment and release on bail, was directed by the police department to submit to being photographed and having certain impressians and measments taken under the "Bertillion System." He afterwards was arraigned and released on bail and now seeks to regain such photograph and imprints by mandamus. Such were the facts in *Gow* v. *Bingham*, 107 N. Y. Suppl., 1011.

It was *held* that the act of the police department was unlawful as being a violation of the right of freedom and the inviolability of the person; that it was contrary to the provision of law that requires the arresting officer immediately to bring the offender before the nearest sitting magistrate; and that the act was not justified by the provision in the city charter that it was the duty of the police to "especially preserve the public peace, prevent crime and detect and arrest offenders," nor by the power of the police commissioner "to make such rules, orders and regulations" as may be reasonably necessary to effect a prompt and efficient exercise of all powers conferred upon him by law. See Sec. 51, Liedeman on State and Federal Constitution; *Joyce* v. *N. Y.*, 27 Misc. (N. Y.), 658, where the plaintiff had been convicted and where the police department was sustained; *Owne* v. *Partridge*, 40 Misc. (N. Y.), 415, same facts and decision as in preceding case, but it is intimated that the result might be different if the plaintiff had not been convicted; *State* v. *Clausmeirer*, 154 Ind., 599, holding that while a sheriff may take a photograph of a prisoner so that he might more readily capture him in case of escape, the sending of such picture to the police department of another city was a libel.

It was *held*, however, that although the defendants were liable to civil action of damages, or criminal prosecution for assault or libel, the plaintiff had no remedy by writ of mandamus, for "a writ of mandamus only lies to compel one to do what ought to be done in discharge of a public duty, and not to undo what is improperly done, even though it may be done under color of the performance of a public duty." See also, Merrill on Mandamus, Sec. 42; *ex parte*, Nast., 15 Q. B., 921; *Dental Society* v. *Jacobs*, 92 N. Y. Supp., 590.

BOOK REVIEWS.

GENERAL PRINCIPLES OF THE LAW OF TORTS. By JOHN C. TOWNES, LL. D. Austin, Texas: Austin Printing Company. 1907. Pp. xi, 337.

As the title indicates, this book deals with the general principles underlying the law of torts and does not take up at all what the author calls the "named torts" except in an appendix, added to give completeness to the work. In this appendix there is a brief treatment of negligence, nuisance, fraud, assault and battery, false imprisonment, malicious prosecution, injuries resulting in death, defamation, torts violative of rights in real property, torts violative of rights in personal property, and interference with property rights under judicial process.

Professor Townes is writing primarily for law students, although there is a generous citation of cases for the assistance of the active practitioner. As a law school text book it is well conceived and gives a clear and complete statement of those principles which are at the basis of all tort law. Perhaps a self-taught student with this book in his hands might be misled by a lack of balance noticeable from the practical point of view. When he began to practice he would hardly be prepared for the great importance which assumption of risk and contributory negligence would take on. This lack of balance, of course, would be corrected by the lecturer when the book was in use by law school classes, and for such use its broad and clear treatment of the subject would be very valuable.

S. B. S.

A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA. By JOHN NORTON POMEROY. STUDENTS' EDITION. By JOHN NORTON POMEROY, JR. San Francisco: Bancroft-Whitney Company. 1907. Pp. xvi, 1048.

The compression of the essential parts of his father's work of four large volumes into a single book of serviceable size is the task assumed by John Norton Pomeroy, Jr. That the revision has been carefully made is not alone a sufficient justi-

fication for its existence. So admirable is the original work, so broad and scholarly is its treatment of the fundamental principles of equity jurisprudence and so clear and comprehensive its discussion of their application that its study ought to form a part of the training of every student and of every practitioner. Furthermore, the day is fast passing—if, in fact, it has not already passed—when there is any need for a "student's text book," as the usefulness of such volumes has largely ceased with the almost universal adoption of the more effective and more scientific case system. It seems, therefore, a difficult task to justify the present volume, for every student ought to be encouraged to consult the original work of the senior Pomeroy if he needs a broader viewpoint than that furnished by his cases, and every practitioner, of course, will desire to avail himself of all the learning at his service in that classic work.

Disregarding, however, these considerations, we can safely say that the "Students' Edition" represents a careful and discriminating effort to compress within a single volume an adequate treatment of the broad doctrine of equity. Fortunately, the present editor has adopted the wise plan of accomplishing this result, not by altering the language used by his father, nor by eliminating individual paragraphs, but rather by cutting out the discussion of particular branches of the law deemed by the editor of lesser importance, and by sweeping away nine-tenths of the original notes. The value of the plan is apparent to anyone familiar with the keen logic and wonderful clearness of expression found in every page of the father's fruitful work. To put before the student within a single volume these thoughts and these discussions of the fundamental principles involved with a few references to leading cases has been the aim of the present editor. His success has been marked. Instead of the confusing discussions, garbled sentences and crude expressions so frequently found in abridgments of this nature, we have a volume which gives to the reader the privilege of studying the subject of equity jurisprudence in the words of a master, coupled with sufficient notes to bring the work down to date and to refer the student to the original books for the leading cases.

R. D. J.

THE LAW OF CHECKS, NOTES AND BANKS, INCLUDING THE RIGHT OF PARTIES IN DEALING WITH BANKS. By THOMAS C. SIMONTON. New York: Victor Van Horen. 1906. Pp. 176.

The author of the above book is already known as a legal writer through his books entitled "Simonton on Municipal Bonds," and "A Hand-book of Practical Law." No attempt is made in this book to present a learned and exhaustive treatise. The object is, rather, to give in small compass the legal ground and reason for the various transactions with commercial paper which business men are carrying on all the time. Added to this is a treatment of the nature and powers of banks. The art of writing legal works for popular consumption is a very difficult one, but Mr. Simonton seems to be at home in this sort of work. However, even when well done, such books are very apt to foster only that little knowledge which is a dangerous thing. The ordinary business man who has learned sound business practice and who consults his attorney on points of difficulty will probably be safer than the one who studies up the subject in a popular text-book and relies entirely on the knowledge thus gained.

S. B. S.

A TREATISE ON THE LAW OF REPLEVIN, AS ADMINISTERED IN THE COURTS OF THE UNITED STATES AND ENGLAND. By H. W. WELLS. Second Edition with notes prepared by Hon. E. T. WELLS, late Associate Justice of the Supreme Court of the Territory of Colorado, from cases selected by the author. Albany, N. Y.: Banks & Company. 1907. Pp. xcv, 807.

Lawyers are always glad when a standard work, which has grown somewhat out of date, is edited and modernized. "Wells on Replevin" has been standard for a long time, but changes in the law take place quickly now, and time enough has elapsed since it was first written in 1879 to make a new edition necessary. The original work was exhaustive, citing over three thousand authorities. The new edition does not disturb the text, but adds the new matter in the form of full notes at the ends of chapters. An especially valuable feature of the work is an excellent index, itself covering 116 pages, which makes readily available the closely packed meat of the book.

S. B. S.

THE LAW AND PRACTICE OF DIVORCE. By G. L. HARDY. London: Effingham Wilson. 1907. Pp. vii, 209.

This little volume is really a handbook containing in a brief compass a summary of the present law of divorce in England. Its treatment of the subject is purely practical. The author has made no attempt to deal with the question of the dissolution of the marital relation from either the historical or analytical viewpoint. For those persons who desire to ascertain whether a divorce or a decree of separation will be awarded by an English court under given comparatively simple circumstances, Mr. Hardy's work will be of assistance, because it will furnish the necessary information as to the law and procedure involved in a very concise form. An interesting appendix to the book contains in full two recent statutes of great importance—The Matrimonial Causes Act (1907), and the Deceased Wife's Sister's Marriage Act (1907).

R. D. J.

THE LAW OF PERSONAL INJURIES, AND INCIDENTALLY DAMAGE TO PROPERTY BY RAILWAY TRAINS, BASED ON THE STATUES AND DECISIONS OF THE SUPREME COURT OF THE STATE OF GEORGIA. By JOHN L. HOPKINS. Atlanta, Georgia: Foote & Davies Company. 1902. Pp. lii, 849.

As indicated by its title, this book is a text-book digest of the negligence law of Georgia. While such text-books can never rank with original works that break the way through some unexplored wilderness of the law, when well done they are extremely valuable, and this particular one is eminently well done. Anyone who desires to find the state of negligence law in Georgia on any particular point needs only to turn to its pages, and, by means of its logical arrangement and full index, he will soon be in possession of all the court of last resort of that State has to say on that subject. When once the ground covered by such a book as this has been thoroughly worked over, and the results put in permanent form, no one, whose time is of any value, can afford to do it again for himself. Consequently, we should expect to find this book in the library of every Georgia lawyer whose practice ever included negligence law.

S. B. S.

A TREATISE ON SUITS IN CHANCERY; SETTING FORTH THE PRINCIPLES, PLEADINGS, PRACTICE, PROOFS AND PROCESSES OF THE JURISPRUDENCE OF EQUITY; AND GIVING NUMEROUS ILLUSTRATIVE FORMS OF PLEADINGS, WRITS, ORDERS, REPORTS, DECREES AND OTHER PROCEEDINGS IN SUITS IN CHANCERY FROM THEIR BEGINNING TO THEIR ENDING; BESIDES MANY PRACTICAL SUGGESTIONS FOR SOLICITORS AND MASTERS. Second Edition. By HENRY R. GIBSON, A. M., LL. D. Knoxville, Tenn.: Gaut-Ogden Co. 1907. Pp. xx, 1203.

"Gibson's Suits in Chancery" has been the standard work on the equity jurisprudence and practice of Tennessee since it was first published in 1891, when the author was in the midst of his career as chancellor. The book before us is the second edition, enlarged and improved by the author's maturest thought. His strong philosophical bent of mind is apparent throughout, yet the intent and accomplishment of the book is eminently practical, so that a balance of valuable qualities is secured to a degree that is most unusual. The scope of the work includes a complete treatise on equity jurisprudence, with special reference to Tennessee, interwoven with everything of a practical nature, form, pleading, writ, order, or anything else that would serve in the practical enforcement of the rights and remedies set out, the whole made available by an excellent index. Such a scope inevitably results in a large book, and when we learn that, among other things, the concurrent jurisdiction of the Chancery Court of Tennessee includes "all suits to recover money due for work or labor done, or services rendered, or for the hire, rent, use, price or value of property, real or personal," we are constrained to wonder at the skill which compresses so much into little more than twelve hundred pages. Probably it was done by leaving out everything unnecessary. This reveals large experience. It is a much to be regretted result of our federal system of diverse jurisdictions, that the value of so masterful a work must be limited in the main to a single state.

S. B. S.

PROCEEDINGS OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION AT ITS THIRD ANNUAL MEETING. Lancaster, Pa.: Wickersham Press. 1907. Pp. 258.

The addresses reported in these Proceedings are written, as is of course to be expected from the purposes of the associa-

tion, from the point of view of an economist rather than from that of a lawyer. Nevertheless, even from the purely technical aspect several of the papers are of undoubted interest to the legal profession. This is especially true of William C. Johnson's address on the Regulation of Life Insurance Companies. The discussion of the problems connected with colonial administration are also worthy of consideration. The article of Charles Johnston (Bengal Civil Service, Retired) "Helping to Govern India," is not only illuminating as to the basis of some of England's administrative measures, but also decidedly entertaining.

R. D. J.

PROBATE REPORTS ANNOTATED: CONTAINING RECENT CASES OF GENERAL VALUE DECIDED IN THE COURTS OF THE SEVERAL STATES ON POINTS OF PROBATE LAW, WITH NOTES AND REFERENCES. By WM. LAWRENCE CLARK, Vol. XI. New York: Baker, Voorhis & Co. 1907. Pp. xxiv, 736.

The modern development of specialism in the law has produced not only text-books on many of its particular branches, but, in increasingly great numbers, series of reports, devoted to one subject. Among the best of these are Probate Reports Annotated. Primarily, each volume consists of about a hundred cases on probate law, drawn from the recent decisions of the courts of last resort of the several states. Following each case is a copious note giving many citations on the same general subject covered by the case reported. At the end of the volume appears a section called "Memoranda of Other Recent Decisions," which gives an annual digest of the probate law of the United States.

The careful selection of the cases printed in full insures that they are all important, and space will not permit here a discussion of the points involved, but as an interesting example of the extent to which some courts will go in their endeavors to prevent the exercise of undue influence, the following is quoted from the syllabus of *Edgerly* v. *Edgerly et al.*, 73 N. H., 407, and found on page 147 of the volume before us.

"On application for probate of a will, the burden is on the proponent to show that the will was not the result of undue influence, so that a mere absence of evidence on such issue is fatal to the allowance of the will."

S. B. S.

PROCEEDINGS OF THE THIRTY-FIRST ANNUAL MEETING OF THE ILLINOIS STATE BAR ASSOCIATION. Springfield, Illinois: Illinois State Register Book Publishing House. 1907. Pp. vi, 214, 164.

In addition to the usual record of the proceedings of a bar association meeting, this Report contains an illuminating discussion of the problem of particular interest in the Central and Western States of the best method of securing fair and impartial service and equitable rates from the railroads. The principal paper on this subject, presented by James H. Wilkerson, Esq., contains a review of the history of federal railroad regulation. In reply thereto Blewett Lee, Esq., delivered an informal address, which in cogent and concise language, summarized the damages which would be imposed upon the railroads by the passage of unconsidered and unwise rate laws, reciprocal demurrage statutes, etc. The financial history of the last six months clearly proves that the prophecy of Mr. Lee was grounded on a solid foundation.

Another interesting and suggestive address is by Edward M. Shepard, Esq., of New York, entitled "Corporate Capitalization and Public Morals." This contains various novel proposals, notably the elimination of the present practice of expressing the value of shares of stock in dollars, which were widely commented on in the general press some months ago. Other papers presented include "Pure Food Laws," by Alfred H. Jones, Esq.; "Some Aspects of the Federal Food and Drug Act," by Frank F. Reed, Esq., and an historical essay on "The Lincoln-Douglas Debates," by Hon. Clark E. Carr.

R. D. J.

COMMENTARIES ON THE LAW OF CONTRACTS. By JOEL PRENTISS BISHOP, LL. D. Second Edition, revised and enlarged by Marion C. Early. Chicago: T. H. Flood & Company, 1907. Pp. xxii, 829.

There have been few legal text-book writers of modern times who have stamped their personality upon the law as has Joel Prentiss Bishop. To him we owe a clear conception of the legal nature of the marriage relation. On reading any of his works we are struck by the freshness and originality of his views, without in the slightest feeling that we are reading an author's opinion instead of the law. We are compelled con-

tinually to wonder at the ability which expresses so much in such small compass, and yet never lacks clearness.

The work on contracts by this author is one of his best and has stood the test of time so well that it would be superfluous to say anything about the original edition. The new edition follows the original closely. Some few changes have been made here and there in the text where recent developments of the law have modified the rule as there laid down. The development of contract law has been mainly in relation to illegal contracts, contracts in restraint of trade, and contracts against public policy. It is in these departments that the main additions to the text have been made. The chief work of the reviser has been in amplifying the notes and bringing them down to date. In this process almost four thousand new cases have been added. The book is made more generally available by references to the reports in common use, such as the Trinity Series, Lawyers' Reports Annotated and the National Reporter System.

S. B. S.

ANNOTATED CASES ON THE LAW OF SURETYSHIP. Selected and annotated by ARTHUR ADELBERT STEARNS. Cincinnati: The W. H. Anderson Co. 1907. Pp. xvii, 688.

The well-known increase in the use of surety bonds to protect the actors in almost every important transaction of the present day business world, which has resulted in a large measure from the development through corporate enterprise of a well recognized system of furnishing such security, has given a new importance to this branch of the law. A natural outcome is the production of a case book, designed for the use of students, devoted exclusively to the law of suretyship. The cases in Dr. Stearn's volume, which is based on the well established plan of such a book, have been well selected. Their grouping, under clearly defined headings, aids in giving to the reader a comprehensive view of the natural divisions of the subject, *e. g.*, Commercial Guarantees, Judicial Bonds, Bonds of Public Officers, etc. It may be thought that such headings as these suggest an empirical rather than a scientific treatment of the basic principles involved, but a more extended examination of the volume dispels this first impression. The notes added by the author to each section not only tend to serve as brief digests of the point illustrated by the principal case, but also to stimulate the student to further investigation of the authorities. The

author has not escaped the danger so omnipresent to the writer of case books. In his desire to secure brevity he has occasionally (*e. g.*, at page 325 in his report of *Mersman* v. *Werges, et al.*, 112 U. S., 139), so cut the report as to eliminate entirely any clear statement of the facts; and instead left it to the student to deduce these from the opinion. This treatment of a case reduces it merely to a condensed opinion—practically yielding the same mental effect as an excerpt from a text-book. The typography and index of the volume are entitled to special commendation for their clearness.

R. D. J.

TREATISE ON THE LAW OF NATURALIZATION OF THE UNITED STATES. By FREDERICK VAN DYNE. Published for the author through the Lawyers' Co-Operative Publishing Company. Washington: 1907. Pp. xviii, 528.

The passage of the Acts of Congress of June 29, 1906, and March 2, 1907, introduced radical changes in the naturalization laws of the United States, not only by making more stringent the requirements imposed upon those desiring to become citizens, but also by changing in many essential respects the previous practice in the United States and State courts. To explain and to amplify these new statutes has evidently been the dominant purpose of Mr. Van Dyne in preparing his volume on naturalization. His treatment of all the questions involved is associated with the appropriate sections of these Acts. The result is that his work is rather a digest of the law and practice of the naturalization courts, than the survey of a student of the broad problems of citizenship. These have, however, already been discussed in a companion volume by the same author. There are two features of the present volume which deserve particular commendation. One is the inclusion, frequently *in extenso*, of the Executive Orders, Naturalization Regulations and similar State papers issued by the Federal Government. The other is the full quotations from opinions of such authoritative bodies as the Spanish Treaty Claims Commission (1905). For example the opinion of that commission in the case of *Ruiz, et al.* v. *The United States*, given at length following page 144, is particularly illuminating on the question of the conclusiveness of a certificate of naturalization.

The importance of the present volume is emphasized by the vigorous efforts now being made under the joint direction of the Departments of Justice and of Commerce and Labor to

stamp out through the provisions of the Acts on which Mr. Van Dyne's volume is based, the widespread naturalization frauds which in the past have been such a disgrace to the country.

R. D. J.

CODE OF FEDERAL PROCEDURE. Embodying Enactments of Congress, Constitutional Provisions, Established Principles and Court Rules in Force December 1, 1906, and the Bankruptcy Act of 1898, with Amendments and Orders, together with a Collection of Forms and Precedents. WALTER MALINS ROSE. Three Volumes. San Francisco: Bancroft-Whitney Company. 1907. Pp. xxx, 1—1042; 1043—2044; 2045-3186.

This work is the outgrowth of Desty's Federal Procedure, the ninth and last edition of which was published in 1899. Mr. Rose has attempted to place before the profession a Code of Federal Procedure arranged on the plan of the Statutory Codes of many of the States. In the preparation and arrangement of his work he has made use of Desty's Procedure, but has rearranged it entirely, and supplemented it not only by a better and more practical arrangement, but by large additions of great value. Since there is no statutory code of precedure officially compiled by Congress, the author has gathered around a logical outline, the constitutional and statutory provisions, court rules and decided cases or established principles of procedure in all the Federal courts, except the Court of Claims and the courts of the District of Columbia. The Code proper is divided into two parts by the author, Part I, entitled "Federal Courts and Their Jurisdiction," and Part II, entitled "Federal Procedure." These are followed by three appendices, the first containing the Rules of the Supreme Court, Equity and Admiralty Rules, the Rules of the Court of Claims and the Rules of all the Circuit Courts of Appeal and Circuit Courts of the various Districts. The second appendix contains the Bankruptcy Act and Orders in Bankruptcy, and the third, a very complete set of forms suitable for almost every phrase of practice in any of the Federal Courts. An index of 134 pages at the end of Volume III, is so complete and has been prepared so carefully from the standpoint of the daily needs of the practitioner that it is worthy of especial notice.

The author has also preceded the sections of the code by tables of Parallel References referring to the sections of the

Constitution, Revised Statutes and Statutes at Large, and to the rules of the various courts in chronological or numerical order and to the sections where they are treated in the Code. This, together with the index, make the book a particularly good tool for practical work. There is no list of case citations other than that in the page notes, and there seems to be no necessity for it in a work of this character. The mechanical arrangement of a three-volume work of this character is of the utmost importance, for the practitioner who uses it must feel that he is able to get all there is on the specific subject in which he is interested in the shortest time, and, with the admirable index and the parallel references, such is easily possible in using Mr. Rose's work.

Part I, on "Federal Courts and Their Jurisdiction" takes up Federal jurisdiction in general, then that of the various Federal courts. A particularly valuable feature of the author's work is the fact that he treats each topic fully and completely, even at the cost of repetition. The work is peculiarily a code in this respect in that the bare law or manner of procedure is stated in concise form with page citations for authority, and practically no space is given to the statement of reasons or theories. Following the chapters on the courts and their jurisdiction, is a chapter on "Fees." This chapter covers the entire field and its compilation from the various rules and statutes and its excellent arrangement make it a most valuable addition to the work.

Part II, is entitled "Federal Procedure." Some of the chapter titles show the system of distinct and separate classification which is characteristic of the work: Chapter 22, Writs and Process in Federal Courts; chapter 28, Parties; chapter 32, Injunctions and Receivers; chapter 47, Arrest and Bail, Civil and Criminal; chapter 58, Mode of taking Appeals, Assignments and Exceptions.

Chapter 42, on "Procedure in Causes under Commerce Laws," is a new and carefully written chapter, and covers the recent legislation on the subject, with citations to such judicial interpretations as were available at the date of publication. Here again the conciseness and orderly arrangement add to the workable value of the chapter.

If a code is of value it is because it is a good workable guide to practice in accordance with its terms. Mr. Rose has given the profession such a book.

R. W. B.

NEW YORK EMPLOYERS' LIABILITY ACT. By ALGER and SLATER. Second Edition by George W. Alger, of the New York Bar. Albany: Matthew Bender & Co. 1907. Pp. xlvi, 291.

This book is written for the use of the New York practitioner. Messrs. Alger and Slater issued the first edition of their work in 1903, soon after the New York Employers' Liability Act of 1902 went into effect, and before it had been judicially interpreted. The cases cited in the first edition are largely English and American decisions from jurisdictions where Employers' Liability Acts had been in force prior to the passage of the New York Act. The new edition by Mr. Alger himself contains, in addition to the very complete citations of cases from other jurisdictions, a full discussion of the New York cases interpreting the Act of 1902. This book does not discuss reasons or theories, but undertakes to state the law in a concise form, citing full lists of cases supporting the propositions of law as stated.

Chapter II, entitled "Changes Effected by the Act in the Responsibility of Employers for the Acts of Persons Exercising Superintendence," has been very much enlarged and improved in this edition by the addition of the New York decisions interpreting this portion of the Act. The author's discussion of the common law on assumed risk as in effect in New York prior to the Act of 1902, and his section upon the change made in the New York law in this respect by section 3 of the Act, is especially clear. The English cases of *Thomas* v. *Quartermaine*, *Yarmouth* v. *France* and *Smith* v. *Baker*, are carefully analyzed and the judicial interpretation of section 3 of the New York Act and the law on assumed risks as evolved from the decisions, is set out in contrast with the English law on this subject.

The principles of employers' liability in general, as enacted into statute law and as distinguished from the common law, are briefly set forth in this little book, making it of value generally in jurisdictions where there is no employers' liability statute.

R. W. B.

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INJUNCTIONS AGAINST NUISANCES AND THE RULE REQUIRING THE PLAINTIFF TO ESTABLISH HIS RIGHT AT LAW.

That equity has jurisdiction over nuisance when the other remedies of the injured person, either at common law or by his own action, are insufficient, is universally acknowledged. From the very nature of the acts causing the injury we can hardly imagine a case of nuisance in which an action for damages is an adequate remedy. Therefore, in practically every case of nuisance it is proper to bring a bill in equity to abate it. In many cases, however, the plaintiff, bringing his bill in the only forum which can give him an efficient remedy, is met by the objection that he can have no permanent relief until he has proceeded against the defendant at law, and, by obtaining a judgment, proved that he has a right and that the defendant is infringing that right.

It is now usually admitted that the rule just referred to applies only to applications for a permanent injunction where the right of the plaintiff, or the fact that the defendant is infringing that right, is a matter of dispute between the parties. Should the plaintiff fail to allege in his bill

that he has secured a judgment at law in his favor against the defendant, the omission does not now usually make the bill demurrable.[1] By his demurrer the defendant admits the plaintiff's allegation. No question being in dispute, the Court cannot be further enlightened by a judgment at law in the plaintiff's favor. So also the rule that the plaintiff must first establish his right at law does not apply where the defendant in his answer, while he denies the plaintiff's right, shows that there is no real question in dispute between the plaintiff and himself in respect to the plaintiff's substantive rights or in regard to his, the defendant's, own violation of those rights.[2] As stated, the rule has no application to a motion for a preliminary injunction. It is true that if the right of the plaintiff is disputed and doubtful, that fact is a very good reason why a preliminary injunction

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[1] *Soltau* v. *De Held*, 2 Sim., N. S. 133, 1851, p. 151; *Aldrich* v. *Howard*, 7 R. I. 87, 1861, p. 94. But see *contra*, *Coe* v. *Winnepisiogee Mfg. Co.*, 37 N. H. 254, 1858; *Green* v. *Lake*, 54 Miss. 540, 1877, p. 544.

[2] "But it was not so much against the general jurisdiction of the court, that the objection is raised, as to its exercise, when the defendant, as in this case, denies the complainant's right. It is the province of this Court, as the defendant's counsel insist, not to try this right, that belonging alone to a court of law, but to quiet the possession whenever that right has been ascertained and settled. If it be intended to say, that a defendant setting up this right by his answer, thereby at once ousts this court of jurisdiction, I cannot assent to it, for it would put an end, very much, to the exercise of an important branch of the powers of the court. This question of right to water is often a very debateable matter, and it would be quite easy for a defendant to satisfy his conscience in his own favor. If it be intended to go no further, than that it is a question which should be sent to law in case of doubt, and often should before injunction be first there established by trial and judgment, then I agree to the proposition. A long enjoyment by a party of a right, will entitle him to restrain a private nuisance, even though the defendant may deny the right, and the Court will exercise its discretion whether to order a trial at law or not, always inclining to put the case to a jury if there be reasonable doubt. In the case cited from 2 John Chan. the Chancellor refused to send the question of right to be tried at law, saying it was clear enough; and a case is cited from Prec. in Ch. 530, where a plaintiff who had long been in possession of a water-course, was quieted by injunction, though he had not established his right at law." Chancellor Pennington in *Shields* v. *Arndt*, 4 N. J. Eq. 234, 1842, p. 245. If the rule does not apply in cases of alleged trespasses on easements where there is no real dispute between the parties *a fortiori* it should not apply in cases of nuisance when there is no real dispute between the parties.

should not be granted; but where the injury threatened is immediate and irreparable, even though the Chancellor may regard the right of the plaintiff as doubtful, he may, by a temporary injunction, prevent the threatened injury to the plaintiff pending the trial of an action at law.

There remain, however, a considerable number of cases in which the answer of the defendant, or the subsequent investigation, develops the fact that there is a real dispute between the parties, either in regard to the plaintiff's rights, or, admitting those rights, as to whether the act of the defendant is causing the interruption to the exercise of his rights of which the plaintiff complains. In this class of cases there is authority to prove that courts of equity often consider it incumbent on them to refrain from deciding the disputed question, requiring the plaintiff to first prove his case at law before they will grant a permanent injunction.[3]

On its face a rule which requires one suffering from an alleged wrong to go to one tribunal to prove his case and to another tribunal for his only efficient remedy, does not appear to have been adopted in the interest of the quick and efficient administration of justice. In the cases it is hard

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[3] The following cases are examples of the refusal of a court of equity to grant permanent relief in cases of nuisance until the plaintiff has established his right at law: *Goodall* v. *Crofton*, 33 Ohio, 271, 1877 (Vibration, due to the defendant's machinery); *Kingsbury* v. *Flowers*, 65 Ala. 479, 1880 (Application to restrain a private burying ground on account of prospective injury to health); *Kennerty* v. *Etiwan Phosphate Co.*, 17 S. C. 411, 1881 (Plaintiff complained of the fumes from the defendant's works); *New Castle* v. *Raney*, 130 Pa. 546, 1889 (It was alleged that a dam had become a nuisance because of the cess-pools which drained into it); *Wood* v. *McGrath*, 150 Pa. 451, 1892 (The case involved a private drain under a public street).

The rule has also been freely applied to those so-called nuisances which are really trespasses on easements and which as shown in the text, are torts of an essentially different character than the alleged torts in the cases just cited. See for example, *Roath* v. *Driscoll*, 20 Conn. 533, 1850. (The defendant was taking water to the detriment of the easement claimed by the plaintiff); *Earl of Ripon* v. *Hobart*, 3 M. & K. 169, 1834 (The defendant, a public body, took water from a stream against the protest of the plaintiff, another public corporation); *Sterling* v. *Littlefield*, 97 Me. 479, 1903 (Alleged interruption of a private right of way).

to find any serious attempt to state the reason for the rule. Usually the necessity for sending the plaintiff to law in doubtful cases is taken as axiomatic; a sure sign that the reason is not generally understood. It has been said that for a court of equity to decide a doubtful question of fact is to trespass on the province of the jury.[4] Yet, in other cases of alleged tort, in cases of waste, in trade-mark cases, and cases of unfair trade competition, equity is repeatedly called upon to determine difficult questions of fact; but, notwithstanding this, in these cases there never has been any thought that the Court was trespassing on the province of the jury. It is true that in many cases—and it is not unlikely that this may often apply to cases of nuisance in which the facts are disputed—it is an advantage to have the testimony taken in open court where the witnesses may be examined and cross-examined. A trial at law secures this advantage. But the Chancellor has also a right to try a case by summoning the witnesses before him, and in some jurisdictions, as, for instance, in Pennsylvania, the Court is required to try the case, unless the parties themselves agree to refer it to an examiner. It may also be admitted that in cases of alleged nuisance a jury is often a better tribunal to determine a disputed question of fact than a judge. In such cases, however, the rule that the court of equity must refrain from acting until the plaintiff has established his right at law is unnecessary, because it is always within the discretion of the Chancellor to order a feigned issue or direct that the plaintiff's bill stand over until he has tested his right by a suit at law. The equitable jurisdiction over nuisance is concurrent with the jurisdiction of the courts of law. His jurisdiction, not being exclusive, the Chancellor is not obliged to determine a doubtful question if he believes that justice

[4] In *New Castle* v. *Raney*,, 130 Pa. 546, 1889, 562, the late Chief Justice Paxson, of Pennsylvania, speaking of cases in which the Court is asked to restrain a public nuisance, said: "It was never intended, and I do not know of a case in the books where the Chancellor has usurped the functions of a jury, and attempted to decide disputed questions of fact, and pass upon conflicting evidence in such cases."

will be better served by having the disputed question of right determined by a common law tribunal. But, there are many nuisance cases in which a judge, or even a master, is much better fitted to determine the disputed questions than a jury. There is no reason why these cases should be sent to law in order to secure a common law trial in those cases in which such a trial is a real advantage. The advantage of the jury trial, in those cases in which it is an advantage, could be obtained, although the profession had never heard of the rule we are discussing.

If a rule of law has apparently no foundation in reason, we usually find that history gives us, if not a reason carrying its own justification, at least an explanation.[5]

The history of the origin of the rule in this country is clear. For much good and some evil our ideas of the extent and the limitations of equity jurisdiction have been, and still are, largely controlled by the decisions, and even the dicta of Lord Eldon. That Lord Eldon thought that it was improper to issue a permanent injunction in cases of alleged nuisance unless the plaintiff had established his right at law is shown by his opinions in the cases of *Attorney-General* v. *Cleaver*[6] and *Crowder* v. *Tinkler*.[7] The first case was a bill to restrain a manufacturing plant on the ground that it was a public nuisance; its operation being offensive and unwholesome. The second case was a bill to restrain the defendants from erecting a corning-house or magazine near the paper mill of the defendant. In neither

[5] Mr. John N. Pomeroy, Jr., in speaking of the rule says: "Doubtless the explanation of it is largely the fact that in early days the courts of equity were reluctant to undertake the decision of purely legal rights, or questions of fact which ordinarily were tried by a jury. It was a rule of expediency and policy, rather than an essential condition and basis of equitable jurisdiction." This explanation, the reader will notice, is in part the one given in the text. See Pom. Eq. Rem. Sec. 522 (Ed. 1905). The quotation is from Pom. Eq. Jur. Vol. 1, Sec. 252. In his Equitable Remedies 519, 522, inclusive, Mr. Pomeroy gives by far the clearest and most complete exposition of the present status of the rule known to the writer.

[6] 18 Ves. 211, 1811.

[7] 19 Ves. 617, 1816.

case would Lord Eldon even issue a preliminary injunction. In the second case he put the question of the plaintiff's right in a more expeditious way to be tried at law; but in the first case, on account of some delay on the part of the relators, he did not go so far. All through his opinions in both cases it is clear that he regards it necessary that the disputed questions should be passed on by a jury. "Admitting," he says, in *Attorney-General* v. *Cleaver*, "the jurisdiction, the question comes at last very much to this: whether, if the Court may grant an injunction, but ought not without a trial by jury, I am authorized to interpose by granting an injunction in the interval; considering the defendants as standing precisely in the same situation as if such a trial had taken place."

If anything further was needed to fasten the belief on the profession in this country that a previous trial at law was necessary in cases of nuisance where any real question of the plaintiff's right arose, it was supplied by Chancellor Kent in his opinion in *Van Bergen* v. *Van Bergen*.[8] He says: "The cases in which chancery has interfered by injunction, to prevent or remove a private nuisance, are those in which the nuisance has been erected to the prejudice or annoyance of a right which the other party had long previously enjoyed. It must be a strong and mischievous case of pressing necessity or the right must have been previously established at law, to entitle the party to call to his aid the jurisdiction of this court." Kent, in this, as in other cases, merely aided in transferring, not in enlarging or restricting, the jurisdiction of the High Court of Chancery as he found it in the English Reports of the eighteenth and early nineteenth centuries. We may conclude, therefore, that the rule requiring a trial at common law in doubtful cases of nuisance is of English origin. It does not come from any opposition to the Court of Chancery, or from any admiration for the system of trial by jury, peculiar to this country.

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[8] 3 Johns. Chancery 282, 1818.

Down to the end of the first quarter of the nineteenth century, the idea that all cases involving the legal title to real property should be tried by jury in a common law action was firmly imbedded in the professional mind. The origin of this idea was probably the same as that which put into Magna Carta the words: "No freeman's body shall be taken or imprisoned * * * excepting by the judgment of his peers * * *"—the feeling, in other words, that a man should not be ousted of the possession of his property by the judgment of an official, as by the king or a judge, but only by the judgment of his neighbors and equals.

It was natural that desire for a jury trial in all disputes of title should be especially strong in cases involving disputes over real property. Social standing depended on the possession of this class of property. On the other hand, we are not surprised to find the court of equity in the early part of the eighteenth century freely passing on disputed questions of title to that form of incorporeal property known as copyright, without sending the plaintiff to law to establish his right. Literary property in the printed and published work, if not created, was first definitely recognized by the Statute of Anne,[9] and the possession of this class of property was without special social significance.

While the feeling that disputes over title to the possession of real property should be determined by a jury at common law, was not strong enough to deter the court of equity from recognizing and enforcing the legal holders' obligation to the *cestui que use*, it was strong enough to prevent that court from determining a disputed question of title to real property when the plaintiff came to the Chancellor, not because the common law courts refused to recognize his substantive right, but because the common law remedy was inadequate to fully protect the plaintiff, admitting him to have rights to protect. If B, under a claim of

[9] For a reference to the early cases in chancery upon the right given by the Statute of Anna, see 7 Brown's P. C. 100, 2d London Ed., 1779.

legal title, attempted to take possession of real property which was in the possession of A, the Court of Chancery would not, at A's instance, protect his possession, because to do so would require the Court to pass on and decide finally the dispute over the title. Thus, down to the time of Lord Eldon, there was no jurisdiction in equity over trespass to real property. He tells us himself, that he remembers perfectly "being told from the Bench very early in life, that if the plaintiff filed a bill for an account, and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction."[10] So strong was the feeling that the Court of Chancery was not the proper tribunal to try a dispute over legal title to real property, that we do not find any instance in which Lord Eldon issued even a temporary injunction to restrain a trespasser pending an action at law to determine the disputed title to the land. He, indeed, issued injunctions to restrain certain technical trespassers, but the facts of the cases in which he took such action show, either that there was no dispute over title, or that the defendants' acts were analogous to waste.[11]

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[10] *Pillsworth* v. *Hopton*, 6 Ves. 51, 1801.

[11] The statement in the text is borne out by an examination of the facts of the following cases—technically cases of trespass—in which Lord Eldon granted an injunction: *Mitchell* v. *Dors*, 6 Ves. 147, 1801 (The defendant in mining coal from his own land had dug under the land of the plaintiff, his neighbor. There was no dispute as to title); *Courthope* v. *Mapplesden*, 10 Ves. 290, 1804 (The defendant, a stranger, conspired with the tenants of the plaintiff in the cutting of timber); *Crockford* v. *Alexander*, 15 Ves. 138, 1808 (B agreed to buy land from A. B obtained possession from the tenant, C, and began to cut timber. At the instance of A, an injunction issued to restrain B); *Thomas* v. *Oakley*, 18 Ves. 184, 1811 (The defendant exceeded the authority which the plaintiff had given him to take stone from the plaintiff's land for one purpose by taking the stone for another purpose). In *Jones* v. *Jones*, 3 Merivale 160, 1817, at p. 173, Sir William Grant says: "No case was cited in which the Court has interfered, at the suit of heir or devisee, to restrain waste, spoil or destruction, by either, while they are litigating their adverse rights in a court of law." The Master of the Rolls does not see any very good reason why "the Court, which interferes for the preservation of personal property pending a suit in the Ecclesiastical Court, should not interpose to preserve real property pending a suit concerning the validity of the devise," and he does

The reported chancery cases of the eighteenth century show us that the rule that the Court could not protect a right in real property if the title to the property was in dispute until a trial at law had settled the question of title was applied, not only to trespass on an alleged right to the exclusive possession of real property, but also to all cases of alleged trespass on easements. If A, for instance, claimed an easement to have light and air come from B's land to his, A's, ancient window, and B erected a building which took away this easement, there could be no final settlement of the dispute except at law.[12] So also, if the plaintiff sought to have equity protect his alleged easement in a stream from the acts of one who denied the easement, or its existence to the extent claimed by the plaintiff.[13] The chancery was not considered the proper tribunal to protect a right of common,[14] or the right to a fishery or an oyster bed,[15] until the plaintiff established his right at law. Neither could the Chancellor determine in the first instance a disputed title to a private or public franchise, as an alleged right to appoint a gamekeeper, or the exclusive right to supply a town with water.[16] So firmly implanted in the professional mind was the idea that disputes which involved

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not admit that he has not the right to do so, though in the case before him he refused the relief. Historically, the reason for the anomaly referred to seems clear. The idea that a jury should decide questions of disputed title was more apt, as is pointed out in the text, to be perpetuated in cases involving property which has a social in addition to its economic value; and besides the Ecclesiastical Court was not a court having a jury as part of its machinery.

[12] In *Ryder* v. *Bentham*, 1 Ves. Sr. 543, 1750, a case involving such a trespass, Lord Hardwicke said that it was agreed that the dispute must be tried at law. See also *Fishmongers' Co.* v. *The East India Co.*, 1 Dick. 163, 1752; *Attorney-General* v. *Bentham*, 1 Ves. Sr. 543, S. C. 1 Dick. 277, 1755; *Birch* v. *Holt*, 3 Atk. 726, 1750.

[13] *Weller* v. *Smeaton*, 1 Bro. Ch. (Second London edition, 1790), 572 1784, repudiating the earlier case of *Bush* v. *Western*, Finch's Prec. in Ch. 530, 1720, before Lord Macclesfield.

[14] *Pawlet* v. *Ingrey*, 1 Vern. 308, 1684.

[15] *Duke of Dorset* v. *Girdler*, Finch Prec. Ch. 531, 1720, fishery; *Lord Tenham* v. *Herbert*, 2 Atk. 483, 1742, fishery; *Welby* v. *Duke of Rutland*, 2 Bro. P. C. (London edition, 1783), 575, 1773, oyster bed.

[16] *Whitchurch* v. *Hide*, 2 Atk. 391, 1742. The idea was also naturally

the determination of title to this class of property could not be settled in chancery, that an application for a temporary injunction, pending the decision of the title at law, to prevent a trespass on the alleged easement, was always refused unless the defendant also threatened physical destruction to the plaintiff's tangible property,[17] or the total deprivation of his enjoyment of the alleged easement.[18] In ordinary cases the most that the Chancellor would do was to insist that the defendant did not raise technical objections to the early determination of the dispute at law.[19] And even this slight

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extended to a case in which the plaintiff sought protection to a right burdensome on the public, as a right claimed by a municipal corporation to lay a tax on importers of cheese. See the *Mayor of London* v. *Perkin*, 4 Bro. P. C. (London edition, 1781), 157, 1734.

[17] *Robinson* v. *Lord Byron*, 1 Bro. C. C. (Second London edition), 588, 1790. In this case the tenant was depriving a mill owner of his easement in the water of the stream which ran his mill, by at one time stopping the water and at another letting it flow down in such quantities as to endanger the mill. A trial at law of an action for damages was pending (see Lord Eldon's statement in *Crowder* v. *Tinkler*, 19 Ves. p. 625). Lord Thurlow restrained the defendant from "using dams, weirs, shuttles, floodgates and other erections otherwise than he had done before the 4th of April, 1785." He would not have issued the injunction had not the defendant recently changed his use of the stream, and had the plaintiff not complained of the result of this recent change in use.

[18] *Ryder* v. *Bentham*, 1 Ves. Sr. 543, 1750; *Attorney-General* v. *Gray's Inn Society*, 2 Ves. Sr. 453, 1752; remarks of Lord Hardwicke; *Attorney-General* v. *Bentham*, 1 Dick. 277, 1755. These are all cases of disputes over ancient lights. The injunction was issued to prevent the stoppage of the lights pending the trial at law. In *Attorney-General* v. *Nichol*, 16 Ves. 337, 1809, Lord Eldon refused to issue an injunction in such a case because the plaintiff's affidavits merely stated that his ancient lights would be darkened by the building that the defendant was erecting. Sir Samuel Romilly had argued for the defendant that to warrant the injunction there must be a total deprivation of light, not a mere obstruction. See also to the same effect *Wynstanley* v. *Lee*, 2 Swan, 333, 1818, a case before Vice-Chancellor Plumber. On the other hand in *Attorney-General* v. *Johnson*, 2 Will. Ch. 87, 1819, Lord Eldon granted a temporary injunction, at the instance of the Attorney-General, to restrain the defendant filling up of a river pending the trial of an indictment for the alleged offense in the King's Bench. Compare, *Arthington* v. *Fawks*, 2 Vern. 356, 1697, where a temporary injunction was granted protecting the plaintiff's alleged right to enclose a common pending the trial of the issue at law.

[19] *Birch* v. *Holt*, 3 Atk. 726, 1750, a case before Lord Hardwicke involving an interference in an alleged right in a mill dam; *Fishmongers' Co.* v. *East India Co.*, 1 Dick. 163, 1752, a case also before Lord Hard-

modification of the rule that the Chancellor would not help the plaintiff until he had established his right at law was an advance on the attitude taken in cases of ordinary trespass; no instance in the eighteenth century being recorded of a temporary injunction having been issued, pending a trial at law, to restrain the person who, under a claim of right, attempted to oust the plaintiff from his possession of the soil.

If we recognize the existence of the conviction that equity cannot decide a disputed question of title to real property in a case where the jurisdiction of chancery is concurrent with courts of law, the refusal to issue a permanent, and in most instances a temporary injunction, to protect the plaintiff's possession of his alleged easement, is inevitable. If A claims an easement of light, or a way, or a right in a running stream, and B denies the claim, the question at issue may be one of two kinds. First, B may deny that A has any easement, either because he has no title to the land to which the alleged easement is said to be attached, or because, admitting A's title to the land, no easement is appendant thereto. In this class of cases, the fact that a question of title is in issue is clear. Second, B may admit the easement, but deny that he is a trespasser because he denies that the easement is as extensive as A claims. The dispute in this last case is similar to a dispute over boundaries between two neighboring land owners, and its settlement equally involves a settlement of disputed title. Theoretically, a third class of cases may arise, in which the defendant is a mere wanton trespasser without claim of right, but practically such a case cannot be found in the early books. The position, therefore,

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wicke, involving a trespass on an alleged ancient light. Lord Hardwicke said: "And as to the question whether the plaintiff's messuage is an ancient building, so as to entitle them to the right of the lights, and whether the plaintiff's lights will be darkened, I will not determine it here; for if it clearly appeared that what the defendants are doing is what the law considers a nuisance, *I would put it in a way to be tried.*" In the case before him the plaintiffs "took nothing" by their motion, because it did not "clearly appear," etc.

that a court of equity should not protect an easement until the plaintiff had established his right at law, was consistent with the Chancellor's refusal to take jurisdiction over cases of alleged trespass.

There was, indeed, a class of cases in which some of the Chancellors maintained the right to pass finally on disputes over title to easements. These were cases in which many persons claimed different easements, the claim to each being denied by a person who asserted a right incompatible with the existence of any of the easements claimed; as of the tenants of a manor claiming a right of common to an extent denied by the lord of the manor,[20] or a municipal corporation claiming the right to fish in a stream to the detriment of similar rights claimed by the different riparian owners.[21] These cases may be supported, and were in part supported at the time, on the ground that the action of equity in taking jurisdiction prevented a multiplicity of suits. This, of course, merely means, that while the desire to prevent disturbance of possession of real property was not, in the great majority of cases, strong enough to overcome the feeling that chancery should not settle a dispute as to title, where the legal title could not be settled finally at law because of the multitude of parties against whom separate actions would have to be brought, some chancellors, as Lord Hardwicke, were willing to overcome their scruples and pass finally on the question of legal title, in order to settle in one proceeding the whole controversy.

Though the Court of Chancery, in the eighteenth century, when asked to restrain the infringement of a right in real property, never, except on the ground of preventing a multiplicity of suits, undertook to decide a dispute as to legal title, it had no hesitation in deciding in such a case a disputed question pertaining to the existence at common law of

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[20] *How* v. *Tenants of Bromsgrove*, 1 Vern. 22, 1681.

[21] *Mayor of York* v. *Pilkington*, 1 Atk. 282, 1737. See also *Eweline Hospital* v. *Andover*, 1 Vern. 266, 1684.

the right which the plaintiff claimed, or the fact of infringement. The jurisdiction over waste is an illustration of this. In a case involving the application to a Chancellor for an injunction to stay waste a dispute over title is impossible. By the very definition of the tort the plaintiff must admit that the defendant is in lawful possession of the property. Waste is an injury to the inheritance done by one having a limited estate during the continuance of the limited estate. The plaintiff is always a remainderman; the defendant the holder of a limited estate carved out of the same title. When the plaintiff brings his bill only two classes of questions can arise. First, those which relate to the extent of the rights over the property which the common law gives to the holder of that temporary estate which the plaintiff admits the defendant to possess. Second, those which relate to the acts which the defendant is doing. A disputed question falling under the first class is almost always a question of law. For even though the law varies the extent of the rights of the holder of the limited estate in accordance with the purpose to which the land was devoted by the last holder in fee and the physical characteristics of the land, these purposes and physical characteristics—although of course questions of fact—are not often in dispute. On the other hand, a disputed quesiton falling under the second head is, of course, always a question of fact. The inadequacy of the action of waste, arising not so much from the remedy given the plaintiff, as from the technicality which limited those who could bring the action to those who held immediate remainders in fee or fee tail, afforded early opportunity to the chancellor to obtain jurisdiction over the subject and issue injunctions to restrain holders of the temporary estates overstepping the limits of their rights to the injury of the land and those who held in remainder. Yet we never hear the defendants claiming that the disputed questions of law and fact should be passed on by a jury.

Now, in cases involving a discussion over an alleged

nuisance, no question of title arises, any more than such a question arises in cases involving a discussion of an alleged act of waste. Nuisance includes all those cases—and if the word is properly employed only those cases—in which the act of the defendant does not involve a trespass. The plaintiff in a case of alleged nuisance does not complain of any taking or of any disturbance of his possession. The plaintiff complains only of the defendant's unlawful interference with his, the plaintiff's, use of his property. This interference with the plaintiff's use, is not due to interrupted possession; or, if it is, the defendant is not committing a nuisance—his acts amount to a trespass.

The possible questions which may arise in nuisance, as in waste, relate to the extent of the common law rights of the possessor of real property, and the extent to which the defendant has interrupted those rights. As in waste, a question falling under the first class is usually, but not necessarily, a question of law; one falling under the second class is necessarily a question of fact; but neither can involve a question of title. If B, the neighbor of A, being a manufacturer, annoys A by the noise and smoke from his, B's, factory, in order to determine whether B's acts in running his factory amount to a nuisance we must first determine the extent to which A, as the occupier of land, has, in view of the situation of that land, a right to be free from being disturbed by smoke and noise. This question is in part a question of fact—what is the character of the neighborhood in which the land is situated?; in part a question of law—admitting the neighborhood to be of a definite character, has A the legal right to be free from the smoke and noise of which he complains? Again—and these fall under the second class—there may be two additional questions; namely, how far A is annoyed by the smoke and noise, and how far the smoke and noise which annoys him comes from B's factory? These are both questions of facts. The moment that B claims a right, beyond that which the law gives him as a holder of property, to fill A's land with smoke or vibrate

the air over it with violent sound waves, he claims an easement over A's property, and the case is not a case of nuisance. If A claims a right to be free from smoke and noise, to an extent beyond that which the law grants to him as an owner of property situated as his property is situated, he claims an easement; and again, it is not a case of nuisance but a case of alleged trespass on an easement.

Take, for instance, such a case as *Green* v. *Lake,* which came before the Supreme Court of Mississippi in 1827.[22] In that case the plaintiffs, the owners and occupiers of certain dwelling houses, brought their bill against the defendant, the owner of a corn and flouring mill on the opposite side of the street, for an injunction to abate the mill as a nuisance, alleging noise, danger from fire, and disease. The Court sustained the defendant's demurrer on the ground that, as the plaintiffs had not shown "imperious necessity," they should first establish their right at law. It will be noticed that had the case been allowed to continue no dispute over any question of title to real property could have arisen. The only issues that could have developed were, the extent of the harm which the defendant was inflicting on the plaintiff, and the extent of the right of the plaintiff, in view of the situation of his property, to be free from that harm. The extent of the harm, the situations of the respective properties of the plaintiff and defendant, were questions of fact; the extent of the plaintiff's right, in view of the situation of the properties, to be free from interruption in the use of their dwelling houses was a question of law; but it is impossible to suppose that any dispute over the titles of the plaintiffs or defendant to their respective properties could have arisen.

The result of our inquiry into the legal ideas of the eighteenth century on the subject of the necessity of a previous trial at law in certain chancery cases, and our analysis of the classes of questions which may arise in cases of nui-

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[22] 54 Miss. 540, 1877.

sance is this: During the eighteenth century there was firmly fixed in the mind of the profession the idea that the Chancellor, when asked to restrain a tort, could not determine a question of disputed legal title to real property, and that in such cases the Chancellor rarely gave even temporary equitable relief, until the plaintiff had established his right at law. This fact, however, does not explain why a plaintiff in a case of alleged nuisance, where there was a doubt as to his right, had to establish his right at law before he obtained equitable relief. In nuisance a dispute over title to real property cannot arise, and chancery could then, as it can now, pass finally on disputed questions of fact and disputed cases of law, when no question of title to real property was involved.

Our problem, then, is to determine how the idea, that in applications for injunctions to restrain a tort chancery could not act if a dispute over title to real property arose until that dispute had been settled at common law, was, in nuisance, transferred into the much broader proposition—one which does not hold good in applications for injunctions to restrain other torts—namely; that if, in an application to restrain a nuisance, any real question of doubt and difficulty arises, the Court is not competent to determine it, but must send the plaintiff to law.

We have seen that Lord Eldon unquestionably regarded it necessary in practically all cases of nuisances that the plaintiffs should prove their rights at law before they had permanent equitable relief, and that the adoption of the rule in this country is due in a great measure to Lord Eldon's opinion. Judged by the practice of the eighteenth century was Lord Eldon mistaken, or did his opinion correctly reflect the practice of his predecessors?

The reported chancery cases involving applications to restrain nuisances prior to Lord Eldon's time are so few that it is perhaps impossible to determine definitely whether he correctly interpreted the practice of the eighteenth cen-

tury. The fact that both he and Sir Samuel Romilly[23] thought it was proper that there should be a trial of law in doubtful cases of nuisance is the best evidence we have of the practice of the court, at least in the last quarter of that century. On the other hand, Lord Loughborough failed to refer to the practice when he issued a temporary injunction on petition and affidavit to restrain a defendant, at the instance of the Mayor of London, from storing any more sugar in certain warehouses, two of the defendant's houses having already collapsed.[24] Again, there is no evidence that Lord Hardwicke would have sent a doubtful case of nuisance to law; indeed, some evidence that he would not have done so. The only reported case of nuisance known to the writer, which came before Lord Hardwicke was the case of *Bains* v. *Baker*,[25] in which a motion was made for an injunction to stay the building of a house to inoculate for the smallpox. Lord Hardwicke in that case denied the motion for three reasons. First, that it was not settled that a house for the reception of inoculated patients was a nuisance; second, that the nuisance, if any, was a public one, and that there should have been an information in the name of the Attorney-General; third, that the fears of mankind, though they may be reasonable ones, will not create a nuisance. As the case is reported he did not say a word in regard to the necessity of a trial at law, unless the first reason given may be taken to intimate such a necessity. That Lord Hardwicke and his predecessors of the earlier years of the eighteenth century did not, generally, lay as much stress on the necessity of a trial at law, even where a question of title was involved, as Lord Eldon,

[23] See the latter's argument for the plaintiff in *Attorney-General* v. *Cleaver*, 18 Ves. at p. 213.

[24] 5 Ves. 129, 1799. The case, of course, was one of pressing necessity, and evidently there was little dispute over the right, either of the plaintiff as mayor to protect the lives of the people, or the fact that the defendant had no right to put his house to a use endangering the lives of the citizens.

[25] Amb. 158, 1752.

can be shown. We have pointed out that a trial at law has never been considered necessary where the plaintiff brings his bill to protect an infringement of a copyright, though a question of title to incorporeal property is practically always involved in such cases. Cases in which the Court of Chancery issued an injunction to restrain an infringement on an alleged copyright, are found during the terms of Cooper, King and Hardwicke.[26] Yet, when Lord Eldon was asked to issue a permanent injunction to protect an alleged patent right, he refused until the plaintiff had established his right at law.[27] The case before Lord Eldon was similar to those cases which involved a disputed copyright, both a patent right and a copyright being incorporeal rights having their origin in a statute. The issuance of a permanent injunction in the first part of the eighteenth century to protect a copyright, without the necessity for a previous trial at law, and the insistance in the first part of the nineteenth century on a trial at law before a permanent injunction would issue to protect a patent right, is evidence that the Chancellors of the first half of the eighteenth century paid less attention than did Lord Eldon to the necessity of a previous trial at law, when, in an application to restrain a tort, a dispute over title to property, not real property, arose. Again Lord Hardwicke, though in *Birch* v. *Bolt*,[28] when he was asked to restrain a trespass on an alleged easement[29] merely put the matter in the most expeditious way to be tried at law, in his opinion in the case of the *Mayor of York* v. *Pilkington*[30]

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[26] 7 Brown's P. C. (2d London Ed.) 100, 1783.

[27] *Hill* v. *Thompson*, 3 Mer. 622, 1817. The good sense of Judge Grier prevented the rule from being adopted by our Federal Courts. In the leading case of *Goodyear* v. *Day*, 2 Wallace, Jr., 283, 1852, he refused to send the plaintiff, who had brought a bill to protect himself from an alleged infringement on his patent, to law to establish his right; went into the disputed questions himself, and issued a permanent injunction. This has been the practice ever since in similar cases in this country.

[28] 3 Atk. 726, 1750.

[29] Compare also his admission in *Ryder* v. *Bentham*, 1 Ves. Sr. 543, 1750, a case involving a trespass on an alleged ancient light.

[30] 1 Atk. 282, 1737.

commends the action of Lord Macclesfield in *Bush* v. *Western*. This last case was one in which Lord Macclesfield issued a permanent injunction to restrain a trespass on an alleged easement in water. The case was subsequently repudiated by Lord Thurlow, and may be admitted to be against all the other precedents of the eighteenth century.[81]

But though we cannot say with certainty that Lord Hardwicke or the other Chancellors of the first half of the eighteenth century would have sent the plaintiff in the doubtful case of nuisance to establish his case at law, and though we may admit that Lord Eldon, who practiced before Lord Thurlow, might be inclined to exaggerate the professional opinion as to the necessity for such a course, it is not difficult to give an explanation for Lord Eldon's opinion and for the practice of his predecessors, if his opinion correctly represents their practice. As has been already remarked, the reported cases in equity in the eighteenth century involving applications to restrain nuisances are very few. In all, we have only two or possibly three reported cases.[82] Of course, there were other cases of which we have no report. But under our system of case law, when there are scarcely any reported cases dealing with a subject, the profession is apt to confuse the few reported cases with cases on other subjects to which they have a superficial resemblance, and the surface similarity between a trespass on an easement and a nuisance has been sufficient to confuse modern judges, though the principles pertaining to nuisance as a distinct tort are now well developed. A rule, such as the rule requiring a plaintiff to establish his right at law before applying for equitable relief, which it is admitted was very generally applied to applications to restrain trespasses on easements, would be more than likely to be applied to applications to restrain a nuisance.

The main reason, however, for applying a rule applicable

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[81] Finch's Pre. in Ch. 530, 1720. *Weller* v. *Smeaton*, 1 Bro. Ch. (London edition, 1790), 572, 1784.

[82] *Baines* v. *Baker*, Amb. 158, 1752, a bill to restrain the erection of a

to a bill to restrain a trespass on an easement to a bill to restrain a nuisance is to be found in the confused nomenclature of our law. Originally, the term nuisance was probably applied to all torts for which an assize of nuisance would lie. The assize of nuisance was designed to give one who complained of the act of another on that other's own land an efficient remedy. It was not material whether the act amounted to a trespass on an easement claimed by the plaintiff, as the stopping of his right of way, or was an act which merely interrupted the plaintiff's use of his own land, and did not involve a trespass, as the maintenance by the defendant of an ill-smelling nuisance. In both cases the plaintiff for his full relief needed an order against the defendant to abate the cause of the injury. The assize of nuisance, therefore, was brought, not only to restrain nuisances properly so-called, but trespasses

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hospital to inoculate for the smallpox; *Mayor of London* v. *Bolt*, 5 Ves. 129, 1799, a bill to restrain the defendant overweighting his houses.

There is also a case called *Morris* v. *Lessees of Lord Berkeley*, 2 Ves. Sr. 453, 1752, where the plaintiff apparently sought to have a building erected on his neighbor's land restrained, not as a trespass on a prescriptive right to have an unobstructed view, but as a true nuisance, that is an interruption to his pleasant enjoyment of his own house. The bill was dismissed. Lord Eldon also speaks of a case, the *Duke of Crafton* v. *Hilliard*, in which the plaintiff sought to restrain, though unsuccessfully, the burning of bricks. See 18 Ves. p. 219. This case may have occurred in the eighteenth century.

A case in the Exchequer in 1795 shows that others shared Lord Eldon's view of the necessity of a trial at law in doubtful cases of nuisance, while at the same time indicating an important exception. This is the case of *Attorney-General* v. *Richards*, 2 Ans. 603, 615, 1795, an information for an injunction to prevent the obstruction of navigation in a public stream by the erection of a wharf. The erection was also *prima facia* a *perpresture*, as the wharf was built between high and low water mark. It was objected that the case should be tried at law, but McDonald, Chief Baron, said: "That may be where the question is of nuisance only, and the evidence doubtful. But the cases cited and those which Lord Hale has given us in the treatise *De Portibus Maris*, clearly prove, that where the King claims and perfects a right to the soil, where a *perpresture* and nuisance have been committed, he may have a decree to abate it." This means that the learned judge thought that the rule, which required that a plaintiff who would protect what he claimed to be his property from one who denied his title, must first prove his title at law, did not apply to the King as owner of the soil between low and high water mark, and that equity would protect the King's right until the subject prove a better title.

on easements.[33] By the first part of the eighteenth century the assize of nuisance had fallen into disuse, but we find the chancery lawyers of that day speaking of a trespass on an ancient light as a nuisance;[34] and though, in cases involving applications for injunctions to protect easements in running water, we do not find the alleged tort of the defendant referred to as a nuisance,[35] this may be merely a coinci-

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[33] F. N. B. 183 *et sec.*

[34] *Attorney-General* v. *Bentham*, 1 Dick. 277, 1755, is a case in which a trespass on an ancient light is referred to as a nuisance. In *Attorney-General* v. *Doughty*, 2 Ves. Sr. 453, 1752, Lord Hardwicke apparently speaks of a trespass on an ancient light as a nuisance. See the third sentence in his opinion, though the last paragraph in his opinion in *Fishmongers' Co.* v. *East India Co.*, 1 Dick. 163, 1752, would appear to indicate that he recognized the difference between a trespass on an ancient light, and the nuisance of making your neighbor's house uninhabitable by darkening his windows. In *Morris* v. *Lessees of Lord Berkeley*, 2 Ves. Sr. 452, a case also decided in 1752, he holds that one who would prevent another from darkening his windows must found his right on a prescription or on an agreement. Fonblanque in his notes to the Equity which bears his name, 3rd Ed., Vol. 1, p. 31, note, also confuses a trespass on a right to look over the land of another, with nuisance, as he collects cases involving trespass on this easement as illustrations of the jurisdiction of equity over nuisance.

[35] The reported equity cases of the eighteenth century involving a trespass on an alleged easement in water are: *Bush* v. *Western*, Finch's Pre. in Ch. 530, 1720; *Birch* v. *Holt*, 3 Atk. 726, 1750; *Weller* v. *Smeaton*, 1 Bro. Ch. (London Ed. 1790), 572, 1784; *Robinson* v. *Lord Byron*, 1 Bro. Ch. (London Edition) 588, 1790. In none of these is the tort of the defendant spoken of as a nuisance. On the other hand, all the early American cases in equity, involving a trespass on an easement in water, speak of the defendant's act as a nuisance, not a trespass. See for example, Chancellor Kent in *Van Bergen* v. *Van Bergen*, 3 Johns Ch. 282, 1818. Notice also that the American editors of Fonblanque's Equity, Mr. Edward Ingraham and afterwards Mr. Anthony Laussat, in adding American cases to the same work, give cases of trespasses on water rights as illustrations of the Court's jurisdiction over nuisance. See 4th American Edition, 1835, Vol. 1, p. 49, notes.

The writer believes that the fact that the reported cases in the eighteenth century involving trespasses on water rights are not referred to in the equity reports as nuisance cases may be explained by the fact that a successful interference in an alleged right in water involves an act directly harmful to the plaintiff's property, as the pulling down of his dam, or the direct taking of visible property in which the plaintiff claims a right, as an upper riparian diverting the water claimed by the lower riparian owner into another channel.

There was also a tendency still indeed observable, to apply the term nuisance to any continuing injury caused by a series of similar acts on the part of the defendant. Thus, in *Coulson* v. *White*, 3 Atk. 21, 1743, Lord Hardwicke says that a common trespass, "if it continues so long as to become a nuisance," may be restrained.

dence, as an assize of nuisance would at an earlier time have been brought for such an injury.[36] This confusion of two fundamentally distinct classes of torts under the same name has continued on both sides of the Atlantic down to our own time.[37]

At the time of Lord Eldon and before, the natural result of treating a trespass on an easement and the carrying on of a noxious trade as torts which could be classified under one name, was to apply the substantive rules of law applicable to the more frequent tort of trespass on easements to the less frequent tort of nuisance. A single illustration will suffice to illustrate the confusion. As nuisance is an interruption to the present use, a plaintiff cannot show a nuisance by merely showing that what the defendant is doing would seriously interrupt the plaintiff's use of his land. The plaintiff must show that his present reasonable use is interrupted by the act of the defendant.[38] There is no possibility of acquiring a prescriptive right to commit a nuisance unless the acts on which the prescription is based have actually interfered with the enjoyment of the land in which the prescriptive right is alleged to be acquired. To gain a right by prescription one must assert a right inconsistent with the right of another. If A has an empty field, to vibrate the ether over it or fill the air with smoke is not asserting rights which the owner of the land is in a position to deny. Thus, where for many years B. in connection with his trade as druggist, had used in his shop two large mortars, that fact did not give B any right to continue to use the mortars when their pounding prevented B's neighbor, a physician, from using a room which he had recently constructed in the rear of his house, as a consulting room.[39] Each has a right to use his own land in any way he chooses, provided such use does

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[36] F. N. B. 184.

[37] See, for example, Webb's Pollock on Torts, 491, edition of 1894.

[38] *Jackson* v. *Duke of Newcastle*, 3 De G. J. & S. 275, 1864, pp. 289, 291.

[39] *Sturges* v. *Bridgman*, L. R. 11 Ch. D. 852, per. Jessel M. R.

not prevent his neighbor from exercising an equal liberty. The mere fact that A first begins to use his land, does not give A a prescriptive right to prevent his neighbor, B, from putting his land to any use which—not in view of A's use of his, A's, land—but in view of the general character of the neighborhood is a reasonable use. These are now recognized as the fundamental rules of law pertaining to nuisance.[40] Yet the doctrine that a man might acquire a prescriptive right to do an act which would be a nuisance to his neighbor, should that neighbor put his land to a certain use,

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[40] *Elliotson* v. *Feetham*, 2 Bing. N. C. 134, 1835; *Brady* v. *Weeks*, 3 Barb. 157, 1848; *Campbell* v. *Seaman*, 63 N. Y. 568, 1876; *Bushnell* v. *Robeson*, 62 Iowa 540, 1883; *Hurlbut* v. *McKone*, 55 Conn. 31, 1887; *Van Fossen* v. *Clark*, 84 N. W. 989, 1901; *Attorney-General* v. *Manchester* (1893), 2 Ch. Div. 87.

The difference between a trespass, considered as a tort involving a dispute over possession of property, and nuisance, is well illustrated by cases involving the pollution of streams. The riparian owner has always been regarded as having an easement in the water. Any attempt to take the water is regarded as a trespass on this easement, and therefore, to prove his right to relief, the riparian owner does not have to show that he is putting the stream to any use, or that the use which he is making of the water is affected by the defendant's act; *Webb* v. *Portland Mnf. Co.*, 3 Sum. 189, 1838, per Story, J.; *Parker* v. *Griswold*, 17 Conn. 288, 1845; *Miller* v. *Miller*, 9 Pa. 74, 1848 That our law should regard the taking of water as a trespass rather than as a mere interruption of use, though not a necessary legal conception, is natural in view of the fact that the typical case is the complaint by the lower riparian owner of the diversion of water by an upper riparian owner. He who diverts running water exercises, by a positive act, dominion over physical property in which, had the diversion not taken place, the lower riparian owner would have presently had a temporary right of possession. But there is no reason why the principles of the tort nuisance should not be applied to the pollution of a stream unless the deposit of filth on the bed of the stream permanently corrupts it, or unless such deposit, by choking the way, alters the direction or depth of the stream. And yet the tendency of the cases is unquestionably to treat a polluter of a stream as a trespasser on an easement belonging to the riparian owner—the easement to have the water run pure—and, therefore, to prevent such pollution, though the plaintiff does not show any present damage from the pollution, the pollution not interfering with any use to which the plaintiff is putting the water. See, for example, *Crossley* v. *Lightowler*, L. R. 2 Ch. App. 478, 1867; *Dwight* v. *Hayes*, 150, Ill. 273, 1894; *Middlestadt* v. *Waupaca Co.*, 93 Wis. 1, 1896; *Mann* v. *Willey*, 51 N. Y. App. Div. 169, 1900. Compare with these cases *McCord* v. *Iker*, 12 Ohio 387, 1843, where the Court treated a defendant who had erected a dam and backed the water on the plaintiff's land from the point of view of one accused of nuisance, not trespass.

so as to render the neighbor powerless to complain if he "came to the nuisance" by putting his land to that use, was stated by Blackstone, and, even as late as 1814, by Lord Ellenborough. Blackstone tells us: "If my neighbor makes a tan-yard, so as to annoy and render less salubrious the air of my house and garden, the law will furnish me with a remedy; or if he is first in possession of the air and I fix my habitation near him, the nuisance is of my own seeking and may continue." [41] Lord Ellenborough thought that a plaintiff could not recover where she had opened a window in the wall of her house through which window entered the offensive odor of which she complained, the cause of the odor existing prior to the opening of the window.[42] The existence of this doctrine of coming to a nuisance, now thoroughly exploded, shows that the true nature of nuisance as a tort not involving a trespass or assertion of the right to possession, was not generally grasped by the profession in the eighteenth and early nineteenth centuries.[43] Is there

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[41] Commentaries, Book II, p. 403. He follows this illustration with a similar one relating to a trespass on an easement in running water. "If a stream be unoccupied, I may erect a mill thereon and detain the water; yet not so as to injure my neighbor's prior mill, or his meadow." And to this illustration he gives the right reason; "for he hath by the first occupancy acquired a property in the current."

[42] *Lawrence* v. *Obee*, 3 Camp. 514, 1814, Lord Ellenborough said: "That the plaintiff having brought the nuisance on herself, by opening the window, had no right of action."

[43] In Gale on Easements, p. 417, 7th Ed., 1899, edited by Cave, it is contended that Blackstone was in error in supposing that a person could obtain a prescriptive right to maintain a nuisance in less than twenty years. Gale, like Blackstone, does not distinguish between nuisance, as a tort by interruption, and a trespass on an easement. Gale, confused the two torts because he collected the assize of nuisance cases, and this action, as we have seen, could be brought to abate a trespass on an easement as well as a nuisance, the wrong in both cases being labeled "nuisance." The difference of opinion between Gale and Blackstone, therefore, does not arise because Gale does not confound a trespass on easements with true nuisances. The two authors merely differ as to the length of time it took in the eighteenth century and before, to require an adverse right so as to enable a defendant to successfully defend an assize of nuisance, whether the assize was brought to abate an odor, or stop the taking of water from a stream. Blackstone, apparently, takes the position that the defendant in both cases need merely show that when he first did the act of which the plaintiff complains,

any wonder that when the fundamental substantive rules of law which apply only to trespass were applied to nuisance, a rule which was a rule pertaining to the jurisdiction of the Court over trespass on easements, should also be applied to nuisance?

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he did not do any present damage to the plaintiff. On the other hand, Gale contends that the defendant had to show that his trespass or his nuisance had continued for twenty years. The exact law of the ancient books on the point in controversy is without the scope of this article. For our present purpose the interesting fact is, that an adverse right in the nature of an easement could, by prescription, be acquired by the constant repetition of an act which would be a nuisance to a neighbor had that neighbor happened to be using his land in a particular way; in short, that a nuisance, such as filling my neighbor's air with smoke, was treated as a trespass; *i. e.*, as a taking of possession of his air; which wrongful taking, if continued long enough, might ripen into an easement.

It is interesting to compare the assumption that a right to commit a nuisance may be obtained by prescription, which is unquestionably the assumption of the early cases, with the more recent cases involving the same question. Some judges have assumed, that if the acts of which the plaintiff complains were the repetition of acts which had been repeated for twenty or more years to the plaintiff's annoyance or the annoyance of his ancestors in title, an easement to continue the nuisance would be created. See, for example, Denman, C. J., in *Flight* v. *Thomas*, 10 A. & E. 590, 1839, at p. 592. Other judges, however, have been careful to refrain from expressing an opinion on the question whether our law now recognizes the possibility of the creation of an easement of this character. See Mr. Justice Coleridge in *Murgatroyd* v. *Robinson*, 7 E. & B. 391, 1857, at p. 397, and Turner, L. J., in *Goldsmid* v. *The Tunbridge Wells, Imp. Com.*, L. R. 1 Ch. App. Cases, 349, 1866. It appeals to the writer that there is no good reason why the law should recognize the possibility of the existence of an easement to pollute the air, foul a stream, or vibrate the ether, so as to render the neighbors' comfortable occupation of their lands impossible. If one who suffers from such nuisance choses to neglect his rights, and fails to bring an action at law or a bill in equity, he should be barred from any relief long before the expiration of twenty years; not only because of his laches, but because his own non-action is almost conclusive proof that what he alleges to be a nuisance does not interrupt his enjoyment of the land, and his right to relief depends on the interruption of his enjoyment. But it is another matter to say, that if the negligent person referred to parts with his land to another, that other and his successors in title are forever barred from protesting against the nuisance; in other words, that the laches of a one-time owner can create in his neighbor an easement to do an act which may be detrimental to health, and prevent any profitable use of the subservient land. The recognition of a new class of easements is always a subject for serious reflection. The idea that there could be an easement to commit a nuisance is, the writer believes, due entirely to the accident that the same action which was used in the old law to abate a nuisance, was also used to

The result of the foregoing examination of the rule requiring a trial at law to determine the plaintiff's right in doubtful cases of nuisance may be summarized as follows:

First, that the rule itself cannot be justified on any theory applicable to modern conditions.

Second, that, admitting that a feeling once existed, which was perhaps justified by ancient conditions that a trial at law should first be had in all cases where chancery was asked to protect the plaintiff's real property from the acts of the defendant but the defendant denied the plaintiff's title to the property and set up title in himself, that fact does not even explain the application of the rule to cases of nuisance in which a dispute over title to real property cannot arise.

Third, that the belief of Lord Eldon and other eminent judges that a trial at law in doubtful cases of nuisance was necessary, arose from the confusion existing in the minds of the profession in the eighteenth and early nineteenth centuries between nuisance and trespass on easements, and the fact that the true nature of the tort nuisance, as a tort involving only the interruption of use, was not understood.

In England the rule has been abolished by statute for nearly fifty years.[44] The reform procedure has a similar

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abate the wrongful assumption of rights which may properly be recognized as easements, as the right in running water, rights of way, etc. Fortunately, the possibility of creating an easement to commit a nuisance can be discussed on its merits, because, though the one time professional opinion recognized the possibility, there are no binding precedents to prevent a re-examination of the question.

Whether or not it is possible to acquire by prescription a right in the nature of an easement to commit a nuisance, it is now generally admitted that in such cases the twenty-year period does not begin to run until there is an actionable nuisance, and no actionable nuisance arises until what the defendant is doing interrupts the plaintiff in his present use of his land. *Sturges* v. *Bridgman*, L. R. 11 Ch. Div. 852, 1879. See also *Flight* v. *Thomas*, 10 A. & E. 590, 1839; *Murgatroyd* v. *Robinson*, 10 E. & B. 391, 1857.

[44] In 1862 Lord Hale's Act, 25 and 26 Vict. C. 42, provided that the Court of Chancery, in those cases in which it would have to refuse or postpone relief until trial at law, should thereafter either determine the disputed question itself, or if more convenient, direct an issue to a jury.

effect in those States which have adopted it.[45] No one can follow the nuisance cases in the other American jurisdictions without realizing that many judges practically ignore the rule.[46] But, though we may observe that the rule is dying, it is unfortunately not yet a corpse; and the difficulty is that no lawyer knows when it will be galvanized into sufficient life to delay and vex his client's pursuit of justice. Defendants set up the plea that the plaintiffs should first establish their rights at law as a makeweight—a random shot, that probably will not, but may, hit something. The writer submits that the sooner a rule of procedure which had its origin in confusion of thought, and which never has and which never can serve any useful purpose that cannot just as well be accomplished without it, shall be sent to the law's lumber room for rules acknowledged to be obsolete, the better it will be for the swift and cerain administration of adequate relief in a class of cases which is every day becoming more important.

William Draper Lewis.

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[45] 5 Pom. Eq. 6th Ed. Vol. V, 522, note 60. See in support of the assertion *Corning* v. *Troy Iron & Nail Factory*, 40 N. Y. 191, 1869, p. 207, per Grover, J.; *Pollett* v. *Long*, 58 Barb. 20, 1870; *Lux* v. *Haggin*, 69 Cal. 255, 1886, p. 284-5, per McKinstry, Jr.

[46] Compare, for instance, the action of the Supreme Court of Pennsylvania in *Mowday* v. *Moore*, 133 Pa. 598, 1890, with the action of the same court in *Sullivan* v. *Jones & Laughlin Steel Co.*, 208 Pa. 540, 1904. Note the dissenting opinion of the Chief Justice in the last case, where he takes the position, that as the rights of the parties are conflicting "their respective claims should be ascertained at law before equity is called upon to aid either." That the rights in that case were conflicting is clear; but they had been elaborately investigated by the Court below, and the majority of the Supreme Court felt themselves in a position to dispose of the case finally.

THE MORAL DUTY TO AID OTHERS AS A BASIS OF TORT LIABILITY.

(CONCLUDED).

II.

In those case which appear to go farthest towards recognizing the existence of a legal duty to take positive steps to remove a peril innocently created or to mitigate an injury innocently caused, there will, in all but one case, be found to exist some ground for the plaintiff's recovery other than a breach of the ethical and humanitarian obligation to care for a fellow-man in helpless misfortune. Either, *first* the defendant has not merely failed to assist the plaintiff, but, by some act done with knowledge or means of knowledge of his peril, has turned it into actual injury or has increased the injury already sustained;[47] or, *second,* the

[47] As in *Weitsman* v. *R. R.*, 55 App. Div. N. Y. 585, Ante 219, and *R. R.* v. *Hill* (*Ark.*), 83 S. W. 303. In all of these cases the plaintiff's injury was caused or materially aggravated by some *act* of the defendants' agent in charge of the instrument which caused the injury, after he knew or ought to have perceived the plaintiff's peril. In *Pannell* v. *R. R.*, 97 Ala. 298, Ante, p. 218, it might appear at first glance that there is recognized a duty to take active steps to *rescue* a trespasser from peril, but in fact while the yard master, who by calling out might have prevented the plaintiff from being run over, had not the immediate physical control of the engine he was in charge of the entire operation of switching in the course of which the plaintiff's injury was received, and the Court speaks throughout of the defendant as the *actor,* who is bound to take care that its acts may not injure others. So in *Kesson* v. *R. R.*, 49 Ohio 230, where a passenger fell from a train, not through any fault of the company, but by reason of his own carelessness, and was seen by the crew lying helpless upon the track, it was held that it was their duty to remove him from the track or give notice to those in charge of the succeeding train, since "it was the duty of the company to use reasonable care to prevent the destruction of his life, which otherwise probably would, and in fact *did result from the movement of one of its trains.*" Whether the crew of the train which ran over the plaintiff knew of his peril or not, the company, through its agents in charge of the train from which he fell, knew

defendant stood in some antecedent relation to the plaintiff, which cast upon him the duty of affording to the latter protection;[48] or, third, the defendant by voluntarily taking upon himself the charge of the situation after knowledge of the plaintiff's peril, has, as it were, assumed a position of voluntary though gratuitous bailee of his safety. Often two or all of these elements co-exist.

The earliest and leading case upon this subject is that of the *B. and O. R. R.* v. *State to the use of Price.*[49] The plaintiff was struck by a train near a public crossing. On looking for his body it was found upon the pilot of the engine. The train crew removed it, and supposing him to

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of it and was bound to take care that he should not be injured by the subsequent operations of its road. The case differs very little from one, where a passenger is injured by reason of a failure of the railroad to send out brakemen to give warning to succeeding trains of the fact of some accidental and perfectably unavoidable stoppage of the train in which the plaintiff is a passenger, by reason of which a collision occurs. True, it is that in the one case only one passenger is helplessly exposed upon the company's tracks, and in the other a train full of passengers; but this only affects the amount of injury probable, not the existence of a duty to prevent it.

Decisions such as these, though often cited in support of the existence of a duty to aid those one has innocently imperilled, have in reality no such tendency. They do not recognize any duty on the railroad's part to remove to a place of safety a trespasser or even a passenger, who, without fault on its part, is in a position subjecting his person or property to the risk of injury from any cause other than the subsequent operation of the company's own business.

Once grant the existence of the duty and these decisions allow the plaintiff to recover, even where his own misconduct has contributed to cause his peril, since he being helpless cannot avoid the final injury, or mitigate his harm, while the defendant, by the performance of this duty (if, indeed, it exists), can do so. But evidently cases which are only of aid if the existence of the duty be assumed can be of no value as authority for its existence.

[48] These relations and the extent to which protective duties are attached thereto are dealt with in the first part of this article, 56 U. of P. Law Review and Am. L. Reg. p. 217, pp. 228, 242.

[49] 29 Md. 420 (1868). This, and the cases cited therein, which merely deal with the question of the railroad's liability for the acts of its employees in caring for the injured man, are the only cases cited by Beach in his work on Contributory Negligence, Sec. 215, and Thompson in his work on Negligence, Vol. ii, Sec. 1744, in support of their contention that the law imposes upon one innocently causing harm to another the duty to care for his victim. And every case which leans toward the recognition of this duty is in the last analysis founded upon its authority.

be dead, without any real examination, although the necessity of such examination was suggested to them, placed him upon a plank stretched across two barrels in their shed or warehouse adjoining their station. They had first proposed to place him in their telegraph office, but the telegraph operator objecting, they had instead placed him in the warehouse and there locked him in. The trial judge affirmed the plaintiff's two principal points, which presented his claim in the alternative; the first, dealing with the doctrine of last clear chance as affecting the plaintiff's right to recover for the original collision;[50] and the second, asserting the plaintiff's right to recover, even though the collision was not caused by the defendant's negligence, if "the decedent's death was subsequently caused by the gross negligence of the defendant, or of its agents acting in the course of their employment," and refused to charge as the defendant requested, that "unless the jury find that the collision, which resulted in the death of the deceased, was caused by the defendant's negligence, the plaintiff is not entitled to recover." The affirmance of the judgment by the Supreme Court necessarily, therefore, involved an approval of both these instructions, and it is plainly erroneous to treat the case as one deciding merely that since the plaintiff was struck at or near a public crossing, the defendant being

[50] The decision of the Court upon this point appears open to grave criticism. It would appear that the plaintiff was struck at a point some distance from the public crossing, and the general tendency is to hold that one trespassing upon a railroad right-of-way by crossing it at a point other than a public crossing has no right to rely upon the absence of the customary signal as indicating that no train is approaching, and that in such case the company owes no duty to such a trespasser to keep a lookout in order to ascertain his presence, or to give any notice of approach of its trains, and, therefore, the defendant, being guilty of no negligence, the question of the plaintiff's contributory negligence, or the application of the last clear chance doctrine could not properly arise under the facts of the case. In addition the evidence was so meagre as to how the collision occurred that it would seem impossible for the jury to do more than guess whether either the plaintiff or defendant had the sole last chance to avert it. So far as the evidence went it appeared to be a case of continuing concurrent negligence on both sides.

liable for the original collision, was answerable for all the naturally ensuing consequences, and to dismiss what was said in regard to the defendant's dealings with the deceased after his body was discovered, as mere dictum.[51]

Under the facts of the case, it was unnecessary to decide that the railroad owed any duty to remove to a place of shelter, to care for, or to provide medical assistance for a trespasser injured without fault on their part. The road had, in fact, taken upon themselves the custody of the deceased, and had dealt with it in a way that was not only lacking in proper care and attention, but which showed a callous and complete indifference to what might become of him. Having taken charge of the deceased they had not merely failed to assist him, but had made bad worse by dealing with him in a grossly inhuman manner.[52]

In ascertaining the true meaning of an opinion, much light may be obtained from a consideration of the arguments addressed to the Court. The plaintiff's whole contention was that there was here something more than mere omission; that "*the act* of the company's servants in locking the man up in the warehouse," was an improper performance of the defendant's "voluntary undertaking to perform an act touching a matter as to which the party was under no duty to do anything." "In other words, the simple case of mandatory or depository."[53] As has been seen, the whole

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[51] As Lathrop, J., does in *Griswold* v. *R. R.*, 183 Mass. 434

[52] They assumed that he was dead, without taking any pains to ascertain his true condition, and treated his body like so much freight, and in the result, not merely failed to provide assistance for him, but put it out of his own power when he came to consciousness, and out of the power of others who might be disposed to help him, to procure for him the assistance necessary to save his life.

[53] On page 432, the plaintiff's counsel say, "whatever might have been the case if the injurious conduct had consisted in mere omission, the company is clearly responsible for the act of its servants in locking the man up in the warehouse. This distinction seems to have been indicated by Lord Chief Justice Best, in the famous Spring Gun case; "it has been argued," he said, "that the law does not compel every line of conduct which humanity or religion may require, but there is no act which christianity forbids that the law will not reach." *Bird* v. *Holbrook*, 4 Bing. 641; they then cite *Coggs* v. *Bernard*, 2 L. D. Raym. 909,

conduct of the defendant's servants, judged by any possible standard of humanity, was hideously bad, and more utter callous disregard of common decency can scarcely be imagined, and as the Court says, "from these facts it was clearly competent for the jury to conclude there was negligence" (active misconduct). Without going beyond what the facts required, and the plaintiff's counsel contended the decision may then well rest upon the statement of Alvey, J., that "if *in removing and locking up the unfortunate man,*[54] though apparently dead, negligence was committed, there is no principle of reason and justice upon which the defendant can be exonerated from responsibility."

The only thing in the decision which affords any ground for the contention that the case recognized a duty to care for those whom one innocently injures, is this one sentence in the opinion of Alvey, J. "From whatever cause the collision occurred, after the train was stopped, the injured man was found upon the pilot of the defendant's engine in a helpless and insensible condition, and it thereupon became the duty of the agents in charge of the train to remove him, and to do it with a proper regard to his safety and the laws of humanity." It may well be that the Court in stating that it was the duty of the defendant's agents to remove the plaintiff's body from the fender, may have been addressing itself to the contention of the defendant's counsel that the acts of the train crew were outside of the scope of their employment. Not merely had the train crew removed the plaintiff's body from the pilot, but it would seem that the circumstances forced them in their employer's interest to do so. Even if the company owed no duty to the injured trespasser to take him to a place of safety, they were, at the least, clearly liable had they caused him further injury by their

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911, as follows: "An action will not lie for not doing the thing for want of a sufficient consideration, but yet, if the bailee will take the goods into his custody, he shall be answerable for them, for the taking of the goods into his custody is his own act."

[54] These words are italicised in *R. R.* v. *Woodward*, 41 Md. 268, where this sentence is quoted.

subsequent operations. They could no more have justified running their engine with his body upon the pilot had further injury resulted to him therefrom[55] than they could have justified running over a trespasser seen to be lying helpless upon their tracks. Until the decedent's body was removed, the engine could not go on, and the whole line would be blocked. The removal of this obstruction to the operation of the defendant's road was thus obviously for its benefit, and within the scope of the employment of its agents in charge of its train.[56]

On the whole it may be said that the case is based upon the principle that irrespective of whether or not a duty exists to aid those whom one has innocently injured, if one does gratuitously assume control of the situation, whether out of kindness or because it is necessary to remove the injured person in order that one may freely prosecute one's own affairs, there does arise a duty analogous to that imposed upon a gratuitous bailee of goods[57]—a duty to exercise common humanity that one shall not by his interference make bad worse. It does not, therefore, tend to support the existence of any legal duty to repair harm innocently caused.

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[55] *Weitzman* v. *Nassau Electric R. R.*, 33 App. Div. (N. Y.) 585, Ante. p. 219 and note 47, p.

[56] In fact, this case is in this respect practically similar to that of *Needham* v. *R. R.*, 37 Cal. 409, where it was held that the company's agents in removing a trespassing horse from a trestle bridge in which it had been caught, an act which, having for its object the clearing of the company's tracks, was plainly within the scope of their employment and for the company's benefit, must consider not their own convenience alone, but also the preservation of the plaintiff's property, and must adopt not the easiest and quickest way of clearing the track, but one which would not unnecessarily imperil the safety of the horse. See also *R. R.* v. *Weber*, 33 Kans. 543, Ante. p. 234, note 24 (a). In this *R. R.* v. *Price* differs from *Ollet* v. *R. R.*, 201 Pa. 361, where the trespasser, whom the train crew carried against his will to the company's hospital, does not to appear to have been in such a position that his removal was a necessary pre-requisite to the further use of the company's track or equipment.

[57] It is worthy of remark that it is dealt with by so astute and careful a writer as Judge Cooley in his work on Torts, in the chapter dealing with the Duties of Bailees.

The defendant's duty consequent upon his assuming charge of the safety of one whom he has injured, is based upon the helplessness of his victim, and requires nothing more than a humane effort to remove him to some point where he can be cared for, and to place him in charge of the public authorities, or of some competent person. It does not continue indefinitely; so, it was held in *B. & O. R. R.* v. *State, for the use of Woodward,*[58] that where a conductor had had his leg crushed in a collision, the company had fully discharged its duty to him by conveying him to the nearest station, and placing him at a hotel in charge of a surgeon and that it was not bound to furnish him with attendants during a subsequent journey to his home, which they, at his own request, had gratuitously furnished him on their line; nor was it liable for the neglect of one of its employees, a friend of the injured conductor, whom they had, at his instance and as a favor to him, allowed to accompany him.[59]

Nor does the case of *Dyche* v. *R. R.*[60] enforce any more extended liability. The plaintiff was throughout the whole transaction in the custody of the company. He had never been turned over to the care of others or placed in a safe place in charge of a competent servant, where, if he had wished, he could have been attended to; though a physician did attend him, this was a mere temporary measure, a precaution taken, as it were, en route. And though the journey came to a temporary stop, it was renewed, not at his instance, but by the company itself; and his injury was

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[58] 41 Md. 268.

[59] In the subsequent journey the plaintiff was in no better position than any other invalid passenger, to whom, as has been seen, the carrier owes no duty to provide attendants or medical assistance. *Statham* v. *R. R.*, 42 Miss. 608, Ante. p. 234, note 24 (a)—Nor would the favor extended him in allowing one of its employees to accompany him at his request make the defendant liable for such employee's conduct any more than supplying a physician to treat its servants renders a company liable for his malpractice. *R. R.* v. *Artist*, 60 Fed. 365; *Allen* v. *S. S. Co.*, 132 N. Y. 91.

[60] 79 Miss. 631.

aggravated and his death caused, not by the negligence of an attendant selected by himself, but by the complete indifference which agents of the company who had charge of removing him to the hospital at Vicksburg, the place selected by the company for his treatment, exhibited in permitting the car in which he was to be ferried two or more times across the Mississippi without removing him, thus losing much valuable time. The Court expressly held that the company was not liable for the conduct of the surgeon, having done its full duty in this particular when it procured the necessary and immediate medical assistance, but they held that, having taken charge of the removal of the plaintiff, it was bound to act in the performance of this self-assumed task, not, it is true, with care and skill, but with at least ordinary humanity.[61]

Dyche v. *R. R.*, is severely criticised by Lathrop, J., in *Griswold* v. *R. R.*,[62] who says that "it proceeds upon the singular ground that if a railroad company, though not in fault in injuring a trespasser, assumes charge of him, there is imposed on it the duty of common humanity, and whether it has performed this duty is a question for the jury. If it is law, no humane or gratuitous act could be done without subjecting the doer of it to an action on the ground that the defendant ought to have acted more quickly, or with more judgment. It is a doctrine which would allow an action against a good Samaritan and let a priest and a Levite

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[61] It may well be that the Court went too far in holding that the jury might find that the defendant had shown a lack of common humanity in sending the plaintiff eighteen miles to a small town where adequate facilities for his care were lacking, when all means of conveying to Vicksburg, which lay immediately across the river, had been suspended for the night; but there seems little doubt that to ferry a man in the condition in which the plaintiff was two or three times across the Mississippi instead of removing him at once to a hospital, was at the least some evidence of callous disregard for his safety, either on the part of those on the spot if they knew of his being in the car, or on the part of those whose sent him, if they took no pains to make known his presence.

[62] 183 Mass. 434.

go free." His statements are, of course, mere dicta. But it is submitted that it would be indeed singular if one who voluntarily and without compensation, or duty to do so, assumes the custody of another's property, should be universally held to the exercise of, at the very least, good faith while one who gratiutously takes charge of the life of another, helpless to save himself, might, without legal liability, display the greatest inhumanity, the most complete indifference to the safety of the life which is taken into his keeping. Nor does he fairly represent the decision in *Dyche* v. *R. R.,* when he intimates that it decides that the question whether the defendant has performed this duty of common humanity, or whether he could have acted more quickly or with greater skill, is always one for the jury. It, in fact, merely decided that there was enough in the facts of that particular case to warrant the jury in holding that the defendants had displayed not a lack of promptitude or competence, but gross inhumanity in dealing with the deceased after they assumed charge of him.

Nor can it be said that the criticism of Lathrop, J., as to the tendency of this decision to discourage the giving of voluntary aid to others, and of its injustice in holding the humane man who tries to relieve the sufferings of his fellow while letting free him who passes by on the other side, is, in view of the nature and extent of the duty imposed, well taken. Regarded from the viewpoint of abstract ethical justice it does not seem improper to require common humanity (and nothing more is required), from one whose humane motives prompts him to interfere in the affairs of others, nor viewed from the standpoint of expediency does it seem that it is the policy of the law to encourage the interference of those, who by their callous indifference, only aggravate the plight of him whom they are professing to assist. And it does seem quite certain that judged in the light of the fundamental principles of the common law, there is a vast difference between requiring a man to go out of his way to

aid others, and demanding that if he does choose to act, he shall not act improperly.[63]

While, as has been seen,[64] there are attached to relations voluntarily assumed varying duties to protect one's associates from injury from causes under the exclusive control of one of the parties, neither party is normally constituted the guardian of the other from all misfortune or perils that may befall him. A shopkeeper is not bound to provide a physician for a customer, nor is a host bound to care for a guest taken ill in his house; but neither may, by any act done with knowledge of his customer's or guest's helpless condition, aggravate his injury, or expose him to unnecessary danger or hardship. So, it has been held, that a saloonkeeper is liable for the death of a customer, who, having become drunk on the premises, was expelled in an unconscious condition late at night and died of the resulting exposure.[65] So, too, where a business guest, overcome by sudden illness, was refused permission to stay over night in his host's house, and was placed helpless and with the reins tied to his shoulders, he being incapable of holding them in his hands, in his sleigh, from which he soon fell and remained by the roadside all night, it was held, that he might recover from his hosts for the loss of his fingers, which were so frost-bitten as to require amputation, if they knew or ought to have known of his helpless condition, for, if they did "they must have known that to compel him to leave their house unattended would expose him to serious injury."[66]

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[63] Even in Rhode Island, a most conservative jurisdiction, where it was held that a railway owes no duty to transport an employee whose feet had become frozen while cleaning its track, to some place where he could procure assistance, *King* v. *R. R.*, 23 R. I. 583, Ante. p. 248, it was held that when a railroad which had assumed the duty of taking home an injured employee was liable to his representatives for his death caused by exposure due to a failure to cover and protect him during the journey—*Bresnahan* v. *Lonsdale Co.*, 51 Atl. 624.

[64] Ante. p. 233, *set seq.*

[65] *Wolff* v. *Weymire*, 52 Iowa, 533.

[66] *Depue* v. *Flatcau*, 100 Minn. 99, 111 N. W. 1. The real difficulty in both cases is as to what the defendants could have done except remove the plaintiff or else shelter him, and, in the latter case, his horse also,

Here, there is more than non-feasance, more than a mere failure to care for an ill guest; there is active misconduct in sending him helpless out into the cold and darkness.

Even a carrier, though said to owe to his passengers the duty to take the highest possible care to secure their safety, is not bound to take steps to relieve them from every peril into which they may fall. Its duty is limited to taking the utmost care in the preparation, operation and policing of its premises, roadbed and equipment, in order that a safe means of transportation may be provided. But, having done all it can to make its premises and equipment safe, having used the utmost care in its operations, and having exhausted all reasonable means to protect its passenger from the known or expectable violence of even those strangers to it, it has discharged its full duty, even though the passenger's safety, because of his physical disability, or of some peculiar situation in which he finds himself, may urgently require some further action on the part of those about him. Beyond the proper preparation and operation of the carrier's business. as to which the passenger may rely upon the carrier's care, he must look to himself or to the personal humanity of those around him, whether fellow-passengers or employees of the carrier, for his protection. That such employees, being of course on the spot, and of presumably more experience, will be probably better able to render aid to a passenger, who, from his physical disability or other peculiar situation, is unable to help himself, may make their humane duty the plainer, but since they are employed by the company to oper-

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for the night. This is perhaps not too stringent a duty to throw upon a saloonkeeper, who, for his own profit has allowed a customer to get helplessly drunk on his premises and has in fact, himself furnished the means of intoxication. And in *Dupue* v. *Flapeau*, the Court intimates that if the guest cannot be conveniently put up for the night, or notice of his condition sent to his friends, he may be set adrift without liability. It would seem that the plaintiff must have been voluntarily received into the plaintiff's house, and that if he has intruded, without invitation or consent expressed or implied, even though he is helplessly ill or drunk, he may be turned out with no more liability than if he had sought and been refused admittance.

ate its means of transportation and to keep it in good condition and not to render humane attention to its passengers, it will not be legally responsible for what they do or do not do in this particular.[67]

It would seem that those jurisdictions, which appear to recognize that a master owes to his servant where the circumstances surrounding the employment are equivalent to those under which a sailor serves during a voyage, a duty (similar to that recognized in such case by the maritime law), to provide such immediate assistance as may be necessary for the servant's safety, in view of the hazardous nature of the employment, his isolation from outside help, and his complete dependence upon the master, should equally recognize that a carrier owed to its passenger a duty to rescue him from dangerous situations likely to spring into being during the course of the journey analogous to the duty which the master of the vessel owes to a passenger to

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[67] An extreme but logically necessary exhibition of this is seen in *Prospert* v. *R. R.*, 67 Atl. 522, R. I. 1907, where through an unavoidable breakdown during a severe snow storm of the rural service of an electric railway one of its cars was stalled without heat in the open country. The plaintiff, who was prevented from seeking shelter for herself by the fact that she had to care for her infant child, was exposed for twelve hours to the cold, and severely injured. It was held that the company was not bound through its conductor to assist its helpless passengers exposed, through no fault of theirs, in the course of transportation to obtain shelter outside of its cars or premises. Had the plaintiff been injured, not by the cold, but by the violence of tramps, who had through the inattention or cowardice of the crew of the car, been allowed to invade it, the railway would undoubtedly have been liable, nor does there seem any doubt that had the conductor negligently failed to use means provided by the company to heat the car, or had the car been inadequately equipped with heating apparatus, the carrier would have been equally responsible, and it seems at first glance hard to distinguish these cases from the principal case. In all the passenger is injured, not by any act of the conductor, but by his passive inaction. While in the latter case, as in the principal case, the active cause of the plaintiff's harm is precisely the same, the cold. But, in the first two cases through the inaction of the carrier's servant, the means of transportation are rendered unnecessarily dangerous to those, who as passengers are entitled to be in it, in the latter, nothing which he could have done would have made the car more safe, nor could he have protected the passenger by any act normally incident to the operation of the company's business as carriers.

rescue him if he accidentally falls overboard.[68] And there is no doubt that while the carrier may not be bound to care for an invalid or drunken passenger,[69] it is bound in its dealings with him to do nothing, which, in view of his helpless condition, will expose him to unnecessary danger.[70]

The case of *Larkin* v. *Salt Air Beach Co.*[71] appears at first glance to hold that a defendant who stands to the plaintiff in the relation so closely allied in its legal incidents to that of carrier and passenger, that of one who for profit holds his premises open to the public as a place of resort, owes to his patrons a duty of general protection. The defendants maintained a public bathing resort, and it was held that it was their duty to make it as safe as possible, and that this duty was not satisfied by giving notice of dangerous holes and other dangers, whether caused by them arising from natural causes,[72] but required them, the bathing beach being dangerous and exposed to sudden storms, to maintain a sufficient force of bathing guards, and to answer for the care, skill and promptness with which they performed their work of rescue. Here, however, in view of the peculiarly dangerous character of the beach, it would seem that no lesser precaution would have rendered its use by the defendant's patrons safe. The duty, therefore, which is here imposed upon the defendant is merely to do all that can be reasonably done to make it probable that its premises can be safely used for the purposes for which it was held open to the public.

In *Raasch* v. *Elite Laundry Co.*[73] the plaintiff, on the facts of the case, might have recovered on the ground that

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[68] Per Field, J., *U. S.* v. *Knowles*, 4 Sawy. 517.

[69] See *Statham* v. *R. R.*, 42 Miss. 607, pp. 612, 613, and *R. R.* v. *Woodward*, 41 Md. 268, Ante. p. 234, note 24a.

[70] See *Weber* v. *R. R.*, 33 Kan. 543, Ante. p. , and *Wheeler* v. *R. R.*, 70 N. H. 607, Ante. p. 234, note 24a.

[71] 83 Pak. 686, Utah.

[72] As in *Dinnehan* v. *Lake Ont. Beach Co.*, 8 App. Div. N. Y. 509, 40 N. Y. Supp. 764.

[73] 98 Minn. 357, 7 L. R. A. N. S. 940, 108 N. W. 477.

the master, acting through his superintendent,[74] had, by improperly starting the machine when he knew that the plaintiff's hand was caught in it, caused the injury of which she complains, the loss of her hand. The defendant, therefore, whether bound to do so or not, had assumed the task of relieving the plaintiff, and her final injury was due to his active misconduct therein. However, the Court repudiates the existence of any distinction between cases where the master makes no attempt to relieve sufferings of an injured plaintiff, as in *Cappier* v. *R. R.*,[75] and cases where such an attempt is made, but negilengtly performed, as in *R. R.* v. *Price*,[76] nor do they attach any weight to the fact that the plaintiff's really serious injury was caused by the superintendent's act in starting the machine after knowledge of the plaintiff's peril. They rest their decision on the ground that those who employ in their business dangerous machinery in the use of which injury is likely to happen to those employed to operate it, whether by pure mischance or through their own ignorance or lack of caution "should be required to take reasonable means to alleviate the suffering occasioned by an accident," though caused by no fault of his; and that he or those to whom he entrusts the management of his business are bound to possess sufficient knowledge of the machinery to extricate the workman from the perilous or injurious situation into which he has accidently or by his own ignorance fallen. In this the case is directly in conflict with *Stager* v. *Troy Laundry Co.*,[77] where it is held, that while an employer may possibly be

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[74] Who in Minnesota, while exercising his power of superintendent and general direction of the business, represents the master as so-called "vice-principal."

[75] 66 Kans. 649.

[76] 29 Md. 420, Ante. p. .

[77] 38 Ore. 480, on the facts, the two cases differed in two particulars though in each the plaintiff's hand was caught in the rollers of a mangle. In *Raasch* v. *Co.*, the defendant's superintendent undertook to act, and his act, owing to his ignorance of the machinery, seriously aggrevated the plaintiff's injuries, while in *Stager* v. *Co.*, the superintendent merely failed to act so as to relieve the plaintiff as soon as he might, had he known more about the machine.

liable if his manager wilfully or wantonly prolongs the sufferings of an employee, he is not bound to possess himself of technical knowledge of the mechanism of machinery with a view to extricate persons from perils to which they may subject themselves by their own folly or negligence, nor to have on the spot some one possessed of such knowledge, for, says Wolverton, J., "it is unusual to anticipate accident and to provide for the most speedy relief when such exigency arises."

It is submitted that upon this point the decision in *Raasch* v. *Co.* is the better. While it may be unusual for those, who in their business use complicated machinery, to provide in advance for the speedy relief of those employed to operate them, if accidents arise, the statistics relating to the casualties yearly occurring to such operatives makes it impossible to imagine that any reasonably careful or experienced manufacturer could fail to realize the extreme liklihood of such accidents. Since, then, this is one of the normal hazards of the business, which, from the very nature of his employment the servant must encounter and from which the master and he alone is able, by appropriate precautions to protect the employees, while they are, of course, helpless and so unable to protect themselves, it would seem that all the elements, the existence of which require the imposition of a duty of protection upon the master are present, and that this obligation should be included in those which the master takes upon himself by assuming that relation to the servant.[78]

Where the accident occurs by pure unavoidable mischance, or through the negligence of a fellow-servant,[79] it

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[78] See pages 235, *et seq.*, and compare with the obligation asserted in *Raasch* v. *Co.*, the duty of a master of a vessel to attempt the rescue of a sailor, who from any cause falls overboard. Field, J., *U. S.* v. *Knowles*, 4 Sawy. 517.

[79] The mere act that the accident occurs through the negligence of a third party or even of one of the parties to the action, no longer makes its occurrence improbable as a matter of law. The view that no one need foresee the misconduct of another, announced in *Vicars* v. *Wilcocks*, 6 East. 1, has long since given place to the modern concep-

is submitted that to hold master to care to extricate the servant from his perilous position involves no novel extension of the master's duties, but results merely from the application to the particular facts of the general principles underlying the duties incident to all mutually beneficial relations voluntarily entered into, and so to the particular relation of master and servant, which is but one of them. Where, however, the plaintiff has by his own negligence[80] contributed to bring about the accident which imperils him, or has known and so assumed the risk of that defect in the machinery whereby he is injured, his right to recover may appear more doubtful; but once concede the general duty to provide for the relief of injured or imperiled employees and it seems plain that, though the plaintiff's negligence has contributed to cause the original accident, the defendant has had the last chance to prevent the injury by the proper per-

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tion that everything, which is, in fact, likely to occur, is legally foreseeable. *Lane* v. *Atlantic C.* 111 Mass. 316, and see 21 Har. L. R. 226, note 2.

[80] An interesting question is mooted in *Raasch* v. *Co.*, whether any different rule should exist where the defendant is free from all fault contributing to the cause of the original accident, and where though in fault, he is not legally liable for it because of the plaintiff's contributory negligence or voluntary assumption of risks. It would seem that while, as a matter of abstract justice, the propriety of holding the defendant liable in the latter case might appear more obvious, there is, nevertheless, no real distinction between them. Even where the defendant is legally liable for the original accident, he is not thereby subject to any new duty arising out of his wrongful authorship of the plaintiff's injury to relieve the sufferings of his victim, but as he is answerable for all the harm that follows as a natural result from his fault, it is to his interest to minimize his victim's injuries and so mitigate the damages he will have to pay.

So, where the plaintiff's own fault has contributed to bring about an injury to him, he is barred from recovering for all the harm which is the natural result thereof, unless the defendant had after knowledge of the plaintiff's peril the sole chance to avert, by the proper performance of his legal duties at that stage of the transaction, all or a distinct and separate part of the plaintiff's harm, but in such case the defendant's liability is based on his ability to avert the harm by doing what it is *legally* his duty to do. Unless, therefore, there is a legal duty either general or arising out of the particular relation in which the parties stand to one another, to relieve his peril or injury, the doctrine of last clear chance cannot apply. So, where a machine used by the plaintiff is known by him to be defective, this does not show the defendant to be

formance of his legal duties.[81] And that though a plaintiff know that a machine is defective, he merely assumes a risk of such injury as this defect necessarily involved, and does not assume the risk that this injury will be unduly aggravated by his master's incompetence or indifference, unless he knows of such incompetence and general indifference and should, therefore, realize that it constitutes an additional source of danger.

Where there is no antecedent relation, such as master and servant, imposing a duty to safeguard plaintiff from injury

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in fault; for he has done his whole duty by furnishing a machine, which is, in fact, no worse than it appears. See Voluntary Assumption of Risk, 20 Harvard L. R. 14. Even in those jurisdictions where the defendant is regarded as in default in supplying as defective machine, and the defendant's knowledge operates as an affirmative defense, while the plaintiff assumes only the risk arising from the violation of those duties which he knows that his master has broken, he, to recover, must point out some duty resting upon his master, by the breach of which he has been injured. Unless, therefore, the existence of a duty on the part of the master to aid an imperiled servant be assumed to exist, it avails him nothing to say that he has taken on himself only the risk of the original accident, and not the risk that by the master's failure to aid him, his injury would be unduly aggravated; for unless such a duty exists he cannot ascribe the aggravation of his harm to the breach of any duty legally owed to him. In the end, therefore, the question comes back to the point from whence it started.—Does the law recognize any general duty or one peculiar to the relation of master and servant to aid those innocently imperiled? If it does, a failure to render assistance is a ground of action whether the defendant was in any fault in causing the original accident or no. If no such duty be recognized the plaintiff's right to recover must depend upon the defendant's legal responsibility for the original accident.

[81] In *Bessimer Co.* v. *Campbell*, 121 Ala. 50, a miner imprisoned in a burning mine was suffocated by the failure of the superintendent who seemed to have completely lost his head in the crisis, to take any steps to render the situation as little dangerous as possible; instead of attempting to preserve the lives of those imprisoned in the mine by continuing to work the ventilating fan, the superintendent, though knowing that the miner was imprisoned, attempted to extinguish the fire by shutting off the air from the shafts. It being one of the universally admitted duties of a master to provide a safe place for the servants' labors, the case is one where master, after knowledge of the servant's peril might have secured his safety by the proper performance of this duty. See the very similar case of *Pierce* v. *Cunard S. S. Co.*, 153 Mass. 87, where the captain of a vessel, in order to extinguish a fire in the hold, battened down the hatches, though warned that one of the crew, who had, perhaps improvidently, gone back to fetch his coat, was still in the hold.

received in the course of employment, and where the defendant has not, after knowledge of the plaintiff's peril, voluntarily taken upon himself the charge of the situation, only one case asserts the existence of any duty to relieve the suffering of one innocently injured. In *Whitesides* v. *R. R.*,[82] it was held that if the servants of the road knew or ought to have known that they had knocked a trespasser from a trestle bridge, they were bound to stop and take care of him. The Court indulges in no reasoning in support of their decision, but accepts as authority without discussion or much apparent, if any, independent investigation the law as stated in Beach on Contributory Negligence,[83] and upon *R. R.* v. *Price* as interpreted therein.[84]

On the contrary, *Capier* v. *R. R.*,[85] and *Griswold* v. *R. R.*,[86] flatly deny the existence of any such duty. In the first case *R. R.* v. *State* is distinguished on the ground that the defendant had assumed charge of the plaintiff; in the latter the Court rejects the idea that even under such circumstances there can arise a legal duty to act with common humanity, apparently fearing that if such a duty were recognized the trial judge would be unable to restrain the jury from giving effect to their prejudice in favor of an injured plaintiff by holding that that which might appear to them to indicate the slightest lack of skill or promptness in fact amounted to inhuman treatment.

On the whole it may be said, that there is in none of the

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[82] 128 N. C. 229.

[83] The Court cites "Black" on Contributory Negligence, edition of 1885, as their authority. The writer has been unable to find any work answering this description. It would appear that the Court must have had in mind Mr. Beach's work upon this subject, which first appeared in 1885, and in which the duty to care for an innocently injured trespasser is announced as existing, for which statement *R. R.* v. *Price* is the only pertinent authority cited.

[84] Cook, J., in a strong dissenting opinion points out that this case fails to establish the view taken by the majority of the courts, in that it merely held the defendant liable for his gross negligence after taking the trespasser into its custody.

[85] 66 Kans. 649, 69 L. R. A. 513.

[86] 183 Mass. 434.

cases, save that of *Whitesides* v. *R. R.*, which, as has been seen, is based upon a misconception of the *R. R.* v. *State to the use of Price* embodied in a text-book of no very eminent authority, any pronounced tendency to the recognition of the existence of a legal duty resting upon an innocent author, of harm to repair the damage that he has wrought. There is, however, a distinct tendency in the cases where the relation of master and servant exists towards the adoption of the more humane view of the maritine law, and toward a fuller recognition that the various duties, universally recognized as incumbent upon a master, are not arbitrarily imposed, but are mere applications of the general principle that wherever the servant must, from the very nature of his employment, encounter perils from which the master alone can protect him, the master owes him a duty to take care to afford him adequate protection, and that this broad principle applies to all cases where the particular facts require it.[87] There is also a distinct tendency[88] to recognize that the gratuitous bailee of human life and limb owes a duty analogous to that due from a similar bailee of goods.

Nor does it follow that because the law has not as yet recognized the duty to repair harm innocently wrought, that it will continue indefinitely to refuse it recognition. While it is true that the common law does not attempt to enforce all moral, ethical, or humanitarian duties, it is, it is submitted, equally true that all ethical and moral conceptions, which are not the mere temporary manifestations of a passing wave of sentimentalism or puritanism,

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[87] In *Allen* v. *Hickson*, 111 Ga. 460, however, it was held that the duty to take active steps to aid a servant was one solely of humanity, from the breach of which no legal liability arose. It is true that the accident occurred by reason of the plaintiff officiously assuming a task outside of the scope of her employment. But while this relieved the master from liability for the original accident, the Court's opinion that the master was not bound save by humanity to aid his servant, was not based upon the fact that she was a volunteer.

[88] Unanimous save for the dicta of Lathrop, J., in *R. R.* v. *Griswold*, 183 Mass. 434, Ante.

but on the contrary, find a real and permanent place in the settled convictions of a race and become part of the normal habit of thought thereof, of necessity do in time color the judicial conception of legal obligation. And it may, perhaps, even be suggested that after all what are now regarded as legal duties as distinguished from moral and ethical duties, merely embody the crude conceptions on such points prevalent at that early stage of national civilization and social development when the King's Court took over into its keeping, and undertook the task of enforcing the common or customary law of England. The precedure was of the crown, but the substantive law it enforced was popular. It was the customs of the English people, or so many of them as were at that time of any political consequence. It represented what the people had come to regard as just and convenient, and was the embodiment of the fixed social and ethical ideas then prevalent.

The conservatism of common law courts has undoubtedly tended to retard the adoption into the body of the law of the more humane conceptions of modern thought, just as the early self-reliant individualism of the English race expressed in its common law survived therein long after it had given way in economic thought to the modern tendency toward collectivism. Nonetheless, as the tendency of modern judicial decision towards collectivism is exhibited in innumerable instances,[89] so, there appear in the cases

[89] Perhaps the most conspicuous forces which have been at work in this direction have been, *first*, the transfer of political and economic power from the land-holding class, to, first, the commercial and manufacturing class, and now to the laboring class. The ownership of land has ceased to carry with it either economic or political power. So long as human nature remains human nature, it is inevitable that power, if possessed, will be exerted to procure material advantage to the possessor. It may be stated as an incontrovertible fact that a politically dominant class will eventually become legally privileged. *Second*, the complete volte face of philosophic thought from individualism to a collectivism verging on socialism. These influences have shown themselves in, *first*, a curtailment of the extraordinary privileges which the early law accorded to the landowner, among them, the almost unrestricted right to do what he pleased with his property; *second*, in enormously extend-

discussed in this article, a distinct tendency toward humaner conceptions. That this development should be slow, is not only natural, but desirable. To the writer it appears essential that courts of law should act as the final brake upon extremes of popular opinion, and should protect the public from their own temporary following after the false gods of extreme setimentalism and fashionable theorism. It appears essential that they should not yield to new ideas until time has proved their permanence, and their real place as a part of the fixed and settled national conviction, until they are seen to be a permanent habit of national thought. None the less, while they should not yield to mere popular hysteria, it would appear that they should not over-rigidly adhere to obsolete methods of thought.[90] The great merit of the common law lies in its flexibility, and this flexibility exhibits itself, not merely in its ability to adapt old conceptions to new facts, but to absorb and apply what is settled and permanent in economic and ethical ideas.

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ing the scope those duties which a citizen owes to his fellows, a recognition that the interests of the common good are of paramount importance in many matters which previously were considered as concerning only the individuals involved, and an adjustment of the proper exercise of mutually conflicting individual rights in accordance with what will best serve the interests of the State as a whole. *Third*, in a weakening of the extreme individualistic attitude which made every man the primary guardian of his own interests, and a growing recognition that there being many classes lacking this power of self-protection, the duty falls with the power of performance. The nicer ethical perceptions of modern times have as yet had less influence, though even here the more enlightened, modern ideal of business honesty has caused the early view that one who had failed to take the precaution to demand a warranty from his vendor, might be cheated with impunity to give place to the view that a vendee need not investigate the truth of facts stated by his vendor.

[90] A true conservatism does not consist in a blind worship of and adherence to what is and always has been, and a flat refusal to avail oneself of the wider experience and greater knowledge of the present time, but on the contrary, in a gradual acceptance of what is good in modern thought, a not too rapid yielding to the just demands of progress, in order that its forces being penned up may not finally in a great flood of ultra radicalism sweep away the existing social structure; and this appears especially true of the law, where it has been so often the case that a blind refusal to modify some archaic and, to modern thought and under present conditions, barbarous rule of law has led to legislative action of the most extreme character.

It may be said that changes so extreme should be left to the legislature. Such a contention would seem to concede almost the whole battleground to the advocates of a code, as distinguished from a common law. The common law is enabled to develop a new conception, and has done so time and time again, by slow steps to a final just and convenient solution of the problem. It is able to advance and recede, and finally to work out a principle capable of enforcement, without undue inconvenience. Legislative action, on the contrary, can make no such compromises and experiments, nor can it take into account every conceivable situation and provide for each. While not arguing for the immediate legal recognition of humanitarian duties it should not be forgotten that a system of law which lags too far behind the universally received conceptions of abstract justice, in the end must lose the sympathy, the confidence, perhaps even the respect of the community. Every day one sees instances of the evils of this divorce between the popular and judicial idea of justice. Juries habitually perjure themselves by verdicts in the very teeth of the facts, because the law as laid down to them by the Court offends the settled popular convicition of what is right.

While courts of law should not yield to every passing current of popular thought, nonetheless, it appears inevitable that unless they adopt as legal those popular standards which they themselves, as men, regard as just and socially practicable, but which, as judges, they refuse to recognize solely because they are not the standards of the past of Brian, of Rolle, of Fineux, and of Coke; they will more and more lose their distinctive common law character as part of the machinery whereby free men do justice among themselves.

To enforce their unpopular rules they must administer them themselves, and must more and more take over the functions of the jury, who cannot be depended upon to carry into effect ideas utterly out of accord with their own ideals of social convenience and justice. More and more

will they tend to become, if not actually, at least to the popular mind, the embodiment of the State as over-lord, not as the incarnation of the will of the people, arbitrarily administering an irksome discipline upon a people yielding thereto only until their dissent grows so strong as to impel them to demand from their legislative representatives recognition of their views.[91]

Francis H. Bohlen.

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[91] It must not be overlooked that the American people like, perhaps all other peoples, is very inert, very slow to move, not acting at all until some violent appeal to their imagination inflames them. This very inertia, once overcome, tends to create a momentum carrying their action to violent and often absurd extremes. Perhaps there is no better simile of the comparison between the ultra conservative attitude of the courts, and that contended for, than the contrasted attitudes of the old-fashioned schoolmaster arbitrarily—almost tyranically—imposing his will upon the students, who yield because nothing short of an appeal to their parents will make resistance effective, and that of Dr. Arnold, who yielding to school sentiment and tradition when just and workable and imperceptibly directing it into proper channels rather than appearing to impose his own will upon his scholars, for so many years made Rugby the ideal Public School.

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NOTES.

ANTI-TRUST LAW AS APPLIED TO LABOR CASES.

The recent case of *Loewe* v. *Lawlor* (208 U. S. 274) on its facts presented a boycott of the plaintiff, a hat manufacturer, by the defendants, members of a vast combination, called the United Hatters of America. This organization is a part of the American Federation of Labor, and the boycott was effected by threatening plaintiff's customers throughout the States with loss of patronage if they continued to deal with the plaintiff. The case was held to be within the Sherman Anti-Trust Act [1] and the defendants were required to pay triple damages under Section 7 of that Act.

The broad principle upon which the case rests is that the Act

[1] Act of July 2, 1890.

applies to combinations of labor as well as capital. This conclusion is based upon the generality of the language of the Act, in that it embraces "*every* contract in restraint of trade;" upon the fact that during the pendency of the bill in Congress futile efforts were made to exempt labor organizations from its operation; and that in at least one case the point had been decided.[2] It is manifest that in holding that the Act applied to combinations of labor as well as capital, a principle was laid down which was much broader than were the facts of the case. The emphasis is laid upon the combination and not upon the *means* employed to effectuate this combination. Thus, although the means here resorted to was a boycott, yet the decision does not seem to have been rested upon this ground. It is submitted, therefore, that the doctrine of our case, that a combination of labor in restraint of interstate commerce is unlawful, substantially affects the common law rules in trade and labor cases. A consideration of the scope of this doctrine will make this apparent.

In our analysis of this doctrine we find these three elements, all of which must exist in order that the doctrine may apply: (1) the combination; (2) the restraint; (3) the interstate commerce; we shall take these up in their order. The combination may be of individuals or groups of individuals, and may take the form of a contract, an unincorporated association, or a corporation.[3] The "restraint" to be within the Act need not be an unreasonable one.[4] On the principle that the fixing of the price of goods embarked in interstate commerce by the members of an association *inter se*, is unlawful,[5] it would seem that the fixing of the price of labor employed in interstate commerce is also unlawful. Therefore, it would seem that a strike in pursuance of such a combination would be within the Act; and that this would probably also be true in case of a "sympathetic" strike. Lastly, the restraint must be of interstate in contradistinction to intrastate commerce. Thus, under the principle that the restraint which the Act declares unlawful is

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[2] *U. S.* v. *Workingmen's Amalgamated Council*, 54 Fed. 994; see also *In re* Dels. 64 Fed. 724.

[3] *Addystone Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211; *Northern Securities Case*, 193 U. S. 197.

[4] *Northern Securities Case* (*supra*).

[5] *Montague* v. *Lowry*, 193 U. S. 38; *Swift & Co.* v. *U. S.*, 196 U. S. 395; *Addystone Pipe & Steel Co.* v. *U. S.* (*supra*).

a restraint upon the transportation and sale, and not upon the manufacture of goods,[6] it would seem to follow that a combination, having for its purpose the fixing of the price of labor in the manufacture of goods within a State, would not be unlawful; and the same result would probably be reached even where the defendant had manufactories in several States. Of course, if, as in the present case, that purpose were effectuated by a means which was a restraint upon the sale of the goods, the combination would thereby become unlawful.

In view of the decision of the principal case, it is not surprising that a number of bills are pending in Congress intended to affect the doctrine of the case—some seeking to annul the decision, and some merely to modify it. It is in the latter category that the proposed Hepburn Amendment to the Anti-Trust Act is to be placed. It provides that "nothing in the said Act * * * is intended * * * to interfere with the right of employees to strike for any cause or combine with each other or with employers for the purpose of peacefully obtaining from employers satisfactory terms for their labor or satisfactory conditions of employment."

The Effect of the Negotiable Instruments Act on the Liability of a Surety.

The first decisions under a uniform code are always to be watched with interest, upon whatever point they may arise, for the tendency of the Courts to follow them will be very strong. Particularly significant are they when bearing upon a fundamental principle of common law. Hence the profession has read with much thought the opinions of the Supreme Courts of Maryland and Oregon, delivered in the cases of *Vanderford* v. *Farmers' and Mechanics' National Bank of Westminster*, and *Cellers* v. *Lyons*, respectively, and collected in 10 L. R. A. (N. S.) 129 and 133. The question arising in these two cases, which, for purposes of interpreting the Negotiable Instruments Act was the same, related to the effect of a binding agreement between the payee of a promissory note and one of two joint and several makers, to extend the time of payment, without

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[6] *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1.

[7] Thus, in *In re* Dels, 64 Fed. 724, a combination originally lawful because not affecting interstate commerce was held unlawful because it later did so.

the knowledge or consent of the other maker, who was on the note only as a surety, and known to be so by all parties. In *Cellers* v. *Lyons* the defendant, when he signed the note, had written the word 'surety" after his name; in *Vanderford* v. *The Bank*, the knowledge of his position had come to the holder in some other way, after the note was given, but it was clearly proved; as was also the binding agreement for extension of time and the ignorance thereof on the part of the defendant. Yet in both cases they so construed the Act as to prevent the discharge of the surety.

The grounds of both decisions are the same. Section 192 of the Act (as originally numbered) defines the party primarily liable as one "who, by the terms of the instrument, is absolutely required to pay the same." These defendants were makers; a maker is absolutely required to pay the note; therefore, defendants have assumed a primary liability. What, then, said the Courts, are the defences enumerated in the Act for parties with primary liability? Section 119 declares that "a negotiable instrument is discharged,

(1) By payment in due course by or on behalf of the principal debtor;

(2) By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

(3) By the intentional cancellation thereof by the holder;

(4) By any other act which will discharge a simple contract for the payment of money;

(5) When the principal debtor becomes the holder of the instrument at or after maturity in his own right."

Nowhere in this section, say the Courts, do we find any mention of binding agreements entered into by one of several comakers discharging the others. That provision appears in the next section, defining the grounds for discharge of a person *secondarily* liable; (Section 120, cl. 6). "By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved." This language, in the judgment of the Courts, is exclusive; it applies to parties secondarily liable and to such only; moreover, one who, by the terms of the instrument, is absolutely required to pay, may never lay claim to such exemption. The only defences open to him are those outlined in Section 119. Wherefore, the inevitable conclusion that, however clearly he may have proved himself a surety, one who has signed as accommodation maker may not be thus discharged.

One of the interesting things about these two decisions is, that the Maryland Court pronounced what was already the rule in the jurisdiction,[1] whereas the Supreme Court of Oregon, in order to arrive at the same conclusion, found it necessary to reverse the existing law of the State.[2] The doctrine arrived at by these Courts was the rule of the early decisions, before equitable defenses were permitted in courts of law,[3] as a necessary result of the principle that paro[l] evidence could not be introduced to vary the terms of a written instrument. But with the introduction of equitable defenses into actions at law, the doctrine was repudiated, and the surety allowed to plead notice on the part of the creditors of his real position on the instrument.[4] Once this step was taken, it was easy to apply the ordinary rules of suretyship, and in the great majority of jurisdictions the accommodation maker was dischargeable under the exact facts of the cases before us.[5] A few States, including Maryland, adhered to the older doctrine,[6] and in these, of course, the Act has wrought no change,[7] but it may be safely laid down that the accepted rule was the other way.[8]

Not the least interesting thing about these decisions is the fact that such an interpretation was foreseen and warned against by Mr. Ames in his famous controversy with Brewster when the Act was passed. He says, ("Comments and Criticisms upon the Negotiable Instruments Law, 14 Harvard Law Review, 241"), with reference to Section 120 sub-sections 5 and 6, that "another sub-section should be added, to the effect that an accommodation acceptor or maker, although the party primarily liable on the instrument, will be discharged if the holder, with knowledge of the accommodation, releases, or by a valid agreement undertakes to give time to the accommodated drawer or indorser." And he adds: "The authorities are almost unanimous on this point also, although in a few jurisdictions the accommodation party must resort to equity

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[1] *Yates* v. *Donaldson*, 5 Md., 389 (1854).
[2] *Findley* v. *Hill*, 8 Or. 247 (1880).
[3] 2 Daniel on Negotiable Instruments, Sec. 1334; *Fentum* v. *Pocock*, 5 Taunton 192 (1813).
[4] *Pooley* v. *Havadine*, 7 El. and Bl. 431 (1857).
[5] *Baily* v. *Edwards*, 4 Best and Smith 761 (1864); *Hubbard* v. *Gurney*, 64 N. Y. App. 457 (1876).
[6] *Delaware Co. Trust Co.* v. *Title Ins. Co.*, 199 Pa. 17 (1901).
[7] Crawford on The Negotiable Instruments Law of Pennsylvania, p. 110.
[8] 7 Cyc. Law and Proc. 882.

for his relief." The failure to add the sub-section recommended by him rendered possible, and perhaps inevitable, the conclusion reached in these 1907 decisions.

I say "*perhaps* inevitable," for a possible way out has been indicated by Mr. Thomas A. Street in a brief note on these same cases in the eleventh volume of Law Notes, page 105. He criticises the decisions in unmistakeable terms, and points out that the introduction of Clause 4 in Section 119—"by any other Act which will discharge a simple contract for the payment of money,"—contemplated the arising of situations unprovided for by a definite section of the Statute, and rendered possible their decision upon common law principles. This, he says, is such a situation. This clause was apparently not dwelt upon in either argument; perhaps it may yet have its effect upon the Courts. The only other Court which has passed upon the question, so far as the writer can discover, is the Supreme Court of New York, in the case of *National Citizens' Bank* v. *Toplitz*, 81 N. Y. Supp. 422 (1903), in which the same interpretation was rendered. The case has not the authority of the Court of Appeals, however, which refused to rule upon this very question, giving judgment upon another point in the pleading.

Mr. Street ends his article with a short but cogent invective against what he calls smooth but dangerous defining clauses (of the nature of Section 192), in all uniform codes, which clog the free play of judicial interpretation. Certainly if such a clause permits a construction contrary to the design of the draughtsmen[1] and subversive of a fundamental and generally accepted rule of the common law, the moral is not without its point.

Restrictions Upon the Use of Land.

A covenant running with the land at law must be under seal; privity of estate is required; and it is immaterial whether the subsequent transferees have notice or not. Those agreements, which run with the land only in equity, termed restrictions, require neither seal nor privity, and notice is essential. In actions upon covenants (1) between the original parties, and (2) by or against transferees; and in actions upon restrictions (3) between the original parties—but not (4) by or against

[1] See address of A. M. Eaton—Reports of American Bar Association for 1907—page 1164.

transferees—there is a concurrent remedy at law and in equity. In all these three cases of concurrent jurisdiction, the question is always one of contracts; and the remedy in equity is always a question of the specific performance of contracts. Whether the burden is negative or affirmative[1] equity will grant relief, either against the original party or his transferee,[1] if the contract is such as equity can specifically enforce. In the fourth class of actions above—actions upon restrictions by or against transferees—there is no concurrent jurisdiction. The remedy in equity is exclusive. Nor is it based upon contract. It is not a question of specific performance, but of constructive trusts. Unless a holder is a purchaser for value and without notice,[2] he is bound as is a purchaser of land from one who has previously contracted to sell it. He takes a *res* in which another has an equity, and the obligation is constructively fastened upon him. In order that there be such an equity in the land, the agreement (1) must concern the use of the land; (2) it must be intended to bind future owners;[3] and (3) it must be one which equity has power specifically to enforce. In England the doctrine has been limited to negative burdens,[4] although as against the promisor, it is held to be immaterial whether the burden is affirmative[5] or negative. Since in England it is apparently the law, that the burden of a covenant running with the land, made by the owner of a fee simple with one other than his lessee, will not run so as to be enforceable against a transferee of the land,[6] there is never any remedy in England upon any agreement concerning land against a transferee, unless there can be a remedy by injunction—with the exception of the burden of a spurious easement, and of a charge upon land.[7] Both of the latter are held to run, and both impose affirmative duties. But in America the prevailing rule is that the burden of a covenant runs as well as the benefit,[8] and equity will

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[1] *Countryman* v. *Deck*, 13 Abb. New Cas. 110 (1883).
[2] *Tulk* v. *Moxhay*, 2 Ph. 774 (1848).
[3] Cf. *Norcross* v. *James*, 140 Mass. 188 (1885); *Brown* v. *Marshall*, 19 N. J. Eq. 537 (1868).
[4] *Haywood* v. *Brunswick Bldg. Soc.*, L. R. 8 Q. B. D. 403 (1881); Cf. *Hood* v. *North Eastern R. R.*, L. R., 8 Eq., Cas. 666 (1869).
[5] *Storer* v. *Great Western Ry. Co.*, 2 Y. & C. C. 48 (1842).
[6] *Keppel* v. *Bailey*, 2 Myln. & K. 517 (1834); *Austerberry* v. *Corp. of Oldham*, 29 Chan. Div. 750 (1885).
[7] *Morland* v. *Cook*, L. R. 6 Eq. 252 (1868) as explained in *Austerberry* v. *Corp. of Oldham*, *supra*.
[8] *Electric City Land & Improvement Co.* v. *West Ridge Coal Co.*, 187 Pa. 500 (1898).

enforce an affirmative burden against the transferee.[1] If the doctrine of constructive trusts is the true basis of allowing the burden of a restriction to run, it should also be immaterial whether it is affirmative or negative. If the contract is one that equity has power specifically to enforce, there is an equity in land in one case just as much as in the other. There is the same probability in one as in the other that the transferee paid less because of the burden—an unjust enrichment in each case. Unless there is some rule of policy, preventing the burdening of successive holders with the performance of affirmative acts for the benefit of others, those American courts which refuse to follow the English limitations, must be considered to have adopted the sounder rule.[9]

As to who is entitled to the benefit of the restriction, depends upon the intentions of the parties. Where the intentions are not expressed, it is a question of construction. Policy favors encumbering the land as little as possible; and therefore, unless a contrary intention appears, the benefit will be construed as personal to the promisee.[10] Prior grantees of the promisee may enforce the restriction against subsequent grantees, if it is clearly shown that it was so intended. This generally happens when land is divided up into lots, and laid out according to a general plan, and each lot is sold subject to the restrictions in that plan.[11] But if it appears that the restrictions were only intended for the benefit of the promisee, or land still retained by him, even though there were agreements between the promisee and each grantee, prior grantees will not be allowed the benefit of restrictions in subsequent grants.[12] If the intention is clearly expressed, there should be no reason why a restriction should not ensue to the benefit of an occupant of land never owned by the promisee. When the restriction benefits adjoining land, owned by the promisee, there is a presumption that it was for the benefit of this land, and subsequent holders can enforce it.[13] The assignment of the contract of restriction is presumed, when the land, to which it is attached, is assigned;

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[9] *Gould* v. *Partridge*, 52 N. Y. App. Div. 40 (1900).

[10] *Badger* v. *Broadman*, 16 Gray (Mass.) 559; *Keates* v. *Lyon*, L. R. 4 Chan. App. 218 (1869).

[11] *Barrow* v. *Richard*. 8 Paige (N. Y.) 351 (1840).

[12] *Jewell* v. *Lee*, 14 Allen (Mass.) 145 (1867); *Sharp* v. *Ropes*, 110 Mass. 381 (1892).

[13] *Peck* v. *Conway*, 119 Mass. 546 (1875); *Wilson* v. *Mass. Inst. Technology*, 75 N. E. Rep. (Mass.) 128 (1900). Cf. *Keates* v. *Lyon*, *supra*.

and the grantee gets the benefit of it whether he had notice of it or not.[14]

In a recent case land was conveyed to a canal company on condition that it construct a basin upon the land conveyed. The consideration was "the benefit which would result" to the grantors, "as owners of said land, by cutting the canal through, and erecting the said work, etc." The grantors erected a mill on the part retained, and for seventy years the basin was used by the grantors and their transferees as a place for loading and unloading vessels. A railroad acquired the land with notice, and constructed its road through the basin. The Court said that relief would have been granted upon the doctrine of Tulk *v.* Moxhay, were the original grantors bringing the bill; but denied relief to the subsequent grantees, because there was no reservation of an easement in fee, due to lack of words of inheritance, and because there was no covenant running with the land. Dawson *v.* Western Maryland Ry. Co., 68 Atl. Rep. (Md.) 301, Dec., 1907.[15] Whether the benefit was intended to be personal to the promisee, was not discussed. There may have been laches or acquiescence.[16] If the subsequent grantee was not entitled to the use of the basin, the purpose of the restriction could be considered to have failed, and therefore the burden should not be enforced.[17] In Massachusetts, where the same doctrine as to reservations is held, an opposite decision was reached, upon analogous facts.[18]

"Revival" of a "Revoked" Will.

One of the most mooted questions of the law of wills is the question of the so-called "revival" of a will "revoked" by an express statement to that effect in a later will, the revoking instrument being subsequently destroyed. The courts in England early differed as to the effect of such an act, the ecclesiastical courts holding that the question was one entirely of intention to be decided according to all the facts and circumstances of each particular case and to determine this question admitted

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[14] *Child* v. *Douglass*, Kay 560 (1854) and see *Rogers* v. *Hosegood* (1900) 2 Ch. 388, p. 406.

[15] Cf. *Hood* v. *North Eastern R. R.*, supra.

[16] *Whitney* v. *Union Ry.*, 11 Gray (Mass.) 359 (1858).

[17] *Duke of Bedford* v. *British Museum*, 2 M. & R. 552 (1822).

[18] *Bailey* v. *Agawan Nat. Bank*, 76 N. E. Rep. (Mass.) 449 (1901).

parol evidence,[1] while the common law courts held [2] that the second will never revoked the first, a will being in its very nature merely intentional and inoperative till the testator's death.[3] A similar difference of opinion has existed in this country. In Pennsylvania [4] it has been held that the presumption is in favor of a "revival" of the first will unless a contrary intention can be shown by contemporary declarations of the testator (*res gesta*). In Massachusetts [5] a wider latitude is allowed and the question being wholly one of intention subsequent parol declarations of the testator are as freely admitted as they were in the English ecclesiastical courts. On the other hand, in Michigan [6] it has been laid down as a positive rule of law that the destruction of a revoking will can never operate to revive the revoked will—the revocation in such cases taking place from the time of the excution of the revoking instrument —and parol evidence is inadmissable to show a contrary intent. In the recent case of Bates *v.* Hacking [7] a diametrically opposite decision was reached, largely on the authority of Goodright *v.* Glazier,[8] which the court cited with approval and followed. It was held that a clause of revocation in a will could have no effect till the date of the testator's death, it partaking of the ambulatory nature of the rest of the will and hence the destruction of a will containing a clause of revocation could have no effect on a prior will, the latter never having been revoked.

The decision [9] has much to commend it. The Pennsylvania and Massachusetts rules (affected as they were by the rulings of the English ecclesiastical courts) seem clearly wrong, since to admit parol evidence—even though it be part of the *res gesta*—seems to be a clear violation of the Statute of Wills

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[1] *Moore* v. *Moore*, 1 Phillim. 375; *Usticke* v. *Barden*, 2 Addams 116.

[2] *Goodright* v. *Glazier*, 4 Burrows 2512 (1776).

[3] The question was finally settled in England by the Wills Act, 7 Wm. IV, and 1 Vict. c. 26, Sec. 22, under which it has been held that no will or codicil revoked by a clause to that effect in a subsequent will can be revived by the destruction of such revoking will or codicil.

[4] *Flintham* v. *Bradford*, 10 Pa. 82 (1848).

[5] *Pickens* v. *Davis*, 134 Mass. 252 (1883).

[6] *Scott* v. *Fink*, 45 Mich. 241 (1881); *Cheever* v. *North*, 106 Mich. 290 (1895).

[7] 68 Atl. 622 (Decided Dec. 30, 1907. Rehearing Jan. 28, 1908).

[8] *Supra.*

[9] It is interesting to note that in *Goodright* v. *Glazier* (*supra*) the reports do not clearly indicate whether or not an express clause of revocation existed in the second will. Subsequent decisions in quoting the case have, however, generally assumed the existence of such a clause.

requiring testamentary instruments to be in writing. The argument against the Michigan rule is that it practically divides one instrument—with one signature and one attestation—into two: one, the clause of revocation, which takes effect immediately, and the other, the rest of the will, which has no effect till the testator's death. Were the clause relied on for the revocation put in a separate instrument there would, of course, be no doubt as to its immediate operation, and the Michigan courts hold the fact that it is put into a will ought not to effect its character.

Certainly, it would seem that the term "revival" is a misnomer (except in jurisdictions which admit parol evidence), since if a will is once revoked it would seem it could not be reinstated without complying with the terms of the statute. If it has never been revoked by the second will, of course there can be no revival, the effect of the original will never having been altered. Had the second will been one merely inconsistent in substance with the first and contained no express clause of revocation, the first would in no case be revoked till the testator's death and hence no question of revival could arise.[9] In Bates *v.* Hacking[7] there was a statute specifying the methods by which a will might be revoked. That revocation by a clause to that effect in a subsequent will was one of the methods enumerated was held immaterial in determining the question as to the time when such revocation clause took effect.

RECENT CASES.

ADVERSE POSSESSION.

Where A executes a mortgage on part of his land, believing it to cover the whole tract, and upon foreclosure and sale, attorns to D, the purchaser, as tenant, pays rent for ten years and at the end of the lease, without claiming title, surrenders possession to B, the grantee of D, to whom a deed covering the whole tract has been executed, D has acquired title to the whole by adverse possession, though he was not in by color of title except by payment of taxes, though physical possession never passed out of A, and though the record disclosed the true boundaries. *Steckter* v. *Ewing*, 93 Pac. (Cal.) 286.

True Owner in Possession as Tenant

Adverse possession must be actual, hostile, exclusive, open, notorious and continuous during the statutory period, five years in California, failure of any one of which bars title by adverse possession. *Collins* v. *Lynch*, 167 Pa. 635; *Ward* v. *Cochran*, 150 U. S. 597; *Creekmur* v. *Creekmur*, 75 Va. 430.

In the principal case, the disseisor paid the taxes on the whole tract which was enclosed within one fence and the owner, during the full period, treated the disseisor as the owner. The decision can be supported under *Royer* v. *Bentlow*, 10 S. & R. 303, which holds that the payment of taxes gives color of title.

But it is held that where the lessee, under belief that he is occupying only the demised premises, occupies land beyond the boundaries thereof, of which the lessor never had possession, nor claimed title to, nor included in the lease, the lessee's possession is not that of the lessor so as to make him a disseisor. *Holmes* v. *Turner*, 150 Mass. 547. So where the lessee of a minor entered and took wrongful possession and the lessor received the rent without ever personally entering upon the land as owner, the lessor is not a disseisor. *Matheson & Trots Case*, 1 Leon. 209. Where one co-owner occupies as tenant of the other, who is in under color of title, the exclusive character of the possession is not destroyed. *Belles* v. *Belles*, 122 Mass. 414. Under these cases there may be some doubt as to the exclusive character of the possession in the leading case.

BILLS AND NOTES.

Endorsement: Cashier

The Uniform Negotiable Instrument Law is declaratory of the Law Merchant in that, where a note is endorsed to A as "cashier," "agent" or "successors in office," it is an anomalous endorsement in which delivery to the principal without endorsement on the note, is in due course, but, where the endorsement is to such person personally, transfer must be made by endorsement on the note to be in due course so as to bar the equities of the antecedent parties. *Bank* v. *McCulloch*, 93 Pac. (Or.) 366.

It is generally held that if a note be payable to an individual with the mere suffix of his official character, such suffix is a mere *descriptio personae*. *Hatley* v. *Pike*, 162 Ill. 241. In other jurisdictions, it is held to show the character in which the person acts. *Babcock* v. *Beman*, 11 N. Y. 200; *Folk* v. *Moebs*, 127 U. S. 597. The relation of principal and agent must appear in the instrument, but if it is ambiguous as to the real party intended such ambiguity may be explained by parol. *Schmittler* v. *Simon*, 114 N. Y. 176.

CONTRACTS.

Assignments: Bankruptcy.

A bankrupt was managing agent for a life insurance company, under a contract having several years to run, which entitled him to an interest in renewal premiums on policies previously written when they should be collected, as long as the contract was in force, subject to the right of the company to terminate such interest if dissatisfied. *Held*, the contract as a whole being based on trust and confidence, was not transferable, yet the rights under the contract passed to the trustee, who would be entitled to the interest in the premiums which had come due since the filing of the petition, even though the company might defeat the object of the transfer by withholding its consent. *In re Wright*, 157 Fed. 544.

The Act of July, 1898, c. 541 (30 Stat. 565), provides that the trustee shall be vested with all the property which prior to the filing of the petition the bankrupt could "by any means have transferred * * *."

But personal privileges subject to restrictions in transfer have been held to vest in trustees in bankruptcy. So a seat in a stock exchange, though the assignee must be elected before enjoying the privileges. *In re Gaylord*, 111 Fed. 717. And a liquor license, where assignee must be approved by the court. *In re Becher*, 98 Fed. 407.

CONSTITUTIONAL LAW.

Interstate Commerce

The Supreme Court of the United States in *Adair* v. *U. S.* (advance sheets March 1st, page 277), declares section 10 of the Act of June 1st, 1898, to be unconstitutional. Section 10 makes it a criminal offense for an officer of an interstate carrier to discharge an employee from service to such carrier, because of his membership in a labor organization. The court holds that this provision cannot be referred to the clause of the constitution giving Congress power to regulate interstate commerce, for there is no legal or logical connection between an employee's membership in a labor organization and the carrying on of interstate commerce, and that the provision is condemned by the fifth amendment.

In *Howard* v. *Illinois C. R. Co.* (Adv. sheets Feb. 1, page 141), the majority of the court were of the opinion that the regulation of the relation of master and servant between carriers engaged in interstate commerce, was a regulation of such commerce. Mr. Justice McKenna, who dissented in the Adair case, was of the opinion that this case was an "immediate and guiding light" to the decision at which he arrived.

It should be borne in mind that in the Adair case the Act under discussion was considered repugnant to the fifth amendment, while the only question in the Howard case was a regulation of interstate commerce.

DISCOVERY.

Production of Documents Before Trial

The plaintiff sued on a judgment obtained in England in an action by the defendant against the plaintiff's assignor. The defendant averred that the English suit was brought without his authority. In order to discover the truth of this assertion, an order was granted, on motion for the production of the defendant's books before trial, under section 724, U. S. Rev. Stat. *Shaefer* v. *International Power Co.*, 157 Fed. 896 (S. N. N. Y. Circuit). This case is in accord with the current of authority, *Exchange Bank* v. *Wichita Cattle Co.*, 61 Fed. 190; *Brown* v. *McDonald*, 133 Fed. 867.

ELEVENTH AMENDMENT.

Suit Against Attorney General

An action against the Attorney-General and prosecuting officers of a State to enjoin them from instituting criminal proceedings is in effect an action against the State, and cannot be maintained in a court of the United States under the eleventh amendment to the constitution. *Logan and Bryan* v. *Postal, etc., Co.*, 157 Fed. 570.

In *Western Union Telegraph Co.* v. *Andrews*, 154 Fed. 95, with facts similar to those in the principal case, it was *held*, that a suit by a foreign telegraph company was an action against the defendants merely in their capacity as attorneys for the State, and was in effect a suit against the State, within the eleventh amendment.

The principle as laid down by Chief Justice Marshall in *Osborn* v. *Bank of U. S.*, 9 Wheat. 738 (1824), that a State is not sued unless it is named as a defendant upon the record, may be said to have been abandoned long ago. A federal court has no jurisdiction of a suit against a State officer to coerce performance of a contract by the State. However, it may take jurisdiction of a suit against such an officer to enjoin a threatened injury to a vested right under authority of an unconstitutional statute of the State. *Yale College* v. *Sanger* (C. C.), 62 Fed. 177 (1894).

See note UNIVERSITY OF PENNSYLVANIA LAW REVIEW, Vol. 56, p. 52.

INSURANCE.

Recovery where the Insured is Executed for Crime

A was executed for crime by the State and his estate sued on an insurance policy, payable to his personal representatives, which contained no stipulation covering the point at issue. Recovery was allowed on the ground that, forfeiture for attainder of blood having been abolished by the federal constitution, the policy, like all other choses in action, passed to his personal representatives. *Collins* v. *Metropolitan Ins. Co.*, 83 N. E. (Ill.) 542.

In the case of suicide the question of recovery has resolved itself into two divisions: first, where the policy is made payable to the estate of the deceased; secondly, where it is vested in a particular beneficiary. Recovery is denied in the first class, because, it is said, a man should not be allowed to increase his estate by crime. *Ritter* v. *Ins. Co.*, 169 U. S. 139. In the

INSURANCE (Continued).

second class relief is granted. *Morris* v. *Life Ins. Co.*, 183 Pa. 563; *Darrow* v. *Family Fund Soc.*, 116 N. Y. 537.

This division does not appear in the cases involving the question under consideration. The decision of *Amicable Society* v. *Bolland*, 4 Bligh (N. R.) 194 (1830), refuses payment on a policy on a state of facts directly in point. This case was decided prior to the abolition of forfeiture from crime in England and was therefore aptly put on public policy. In *Burt* v. *Insurance Co.*, 187 U. S. 362, also on all fours with the case under discussion, recovery was denied.

In a litigation involving the same parties as the present case, the two decisions cited, which seem to be the only cases squarely in point, were approved and followed; *Collins* v. *Ins. Co.*, 27 Pa. Super. Ct. 353. These rulings seem to adhere to the first division of the suicide cases.

SALES.

By Dealer—Implied Warranties—Fitness for Purpose Intended

A dealer who keeps for sale specific well-known brands of piping for the particular purpose of driving oil wells and who knows that the buyer intends using it for such purpose, impliedly warrants the fitness of the piping for the known contemplated use, and the fact that the buyer designated a particular brand of piping which the seller furnished, does not prevent the implied warranty of fitness from arising. *Oil Well Supply Co.* v. *Priddy* (Indiana), 83 N. E. 623.

The case of *Jaricki M'f'g Co.* v. *Kerr*, 165 Pa. 529, reaches a contrary decision upon almost the identical facts, holding, "that where the buyer ordered a particular brand of tubing to be used for an oil well, which was delivered to him, it is no defense that it was not suitable for the purpose for which he wanted it, although the seller knew the use to which it was to be put." The latter case was judged *per curiam* to fall within the third rule as designated by Justice Mellor in the case of *Jones* v. *Just*, L. R. 3 Q. B. 197, to wit, "Where a known, described and definite article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, prescribed and defined thing be actually supplied there is no warranty that it shall answer the particular purpose intended by the buyer." Myers, J., brings the present case under the fourth and fifth rule as laid down by Justice Mellor,

SALES (Continued).

that where a dealer undertakes to supply an article in which he deals, for a particular known purpose, so that the purchaser relies upon the judgment and skill of the dealer, there is an implied warranty that the article shall be reasonably fit for the purpose intended. English and many American jurisdictions accord. *Zimmerman* v. *Dreucker*, 44 N. E. 557; *Emaho Coal Co.* v. *Fay*, 37 Neb. 48. Contra, *Thompson* v. *Libby*, 35 Minn. 443; *Dounce* v. *Dow*, 64 N. Y. 411; *Gerst* v. *Jones & Co.*, 32 Gratt (Va.) 518.

Statute of Frauds—Acceptance and Receipt

B, after having lumber belonging to A upon his premises for thirty days, verbally offered to buy it from A. A the next day accepted the order. Five days later B repudiated the contract. *Held*, that since B did not repudiate the sale immediately on getting A's acceptance of his offer, there was acceptance and receipt of the goods sufficient to satisfy the Statute of Frauds. *Godkin* v. *Weber*, 114 N. W. 924. One person in possession of another's goods may become the purchaser of them by parol, and may do subsequent acts which amount to an acceptance and receipt within the statute. *Benjamin on Sales*, *5th Ed.* 215. Very slight evidence is sufficient to show acceptance and receipt, as where a factor, having property of his principal in his possession, purchased it by parol and then sold it, which, of course, under his contract of factorship he was entitled to do. *Edan* v. *Dudfield*, 1 Q. B. 302. But it must clearly appear that the conduct of the buyer in dealing with goods already in his possession is wholly inconsistent with the fact that his former possession continues unchanged. *Lillywhite* v. *Devereux*, 15 M. & W. 283. As there was nothing in the principal case inconsistent with the possession which existed before the sale remaining unchanged, it is submitted that the case should not have gone to the jury. *Silkman Co.* v. *Hunholz*, 112 N. W. 1081.

STATUTE OF FRAUDS.

Agreements Not to be Performed within a year

A conveyed land to B, part of the consideration was B's oral promise to pay certain notes given by A. The notes were not due within a year. *Held*, the contract being completely executed on one side was not within not to be performed within a year must be in the statute of frauds, providing that agreements writing. Supreme Court of Colorado in *Enos* v. *Anderson*, 93 Pac. 475.

STATUTE OF FRAUDS (Continued).

The rule adopted here appears to have had its origin in *Donellan* v. *Read*, 3 Barn. & Ald. 899.

In this country the rule is generally held to apply, but only when nothing remains to be done but the payment of money. *Curtis* v. *Sage*, 35 Ill. 22; *Reed* v. *McCormick*, 45 S. E. 868.

It has been held that where both sides of the contract are executory, an action would lie against the party whose promise was capable of being performed within the year, but not against the party whose promise was not to be performed within the year. *Sheeby* v. *Adarene*, 41 Vt. 541.

The arguments in favor of the view that such a contract is within the statute unless it is to be completely executed within the year, seem to be based on a sounder interpretation of the statute. *Marcy* v. *Marcy*, 9 Allen 8; Browne on the St. of Fr., page 382 (5th Ed).

WILLS.

Signing—Making a Mark for a Signature

A statute in the jurisdiction provides that the will of a testator shall be "signed by him or by some person in his presence and by his express direction." A testator's name, without his request, was placed at the end of a proposed will and the testator then made his mark. *Held*, that this was a sufficient signing within the statute. *In Re Tierney's Est.*, 114 N. W. 838. That the testator's mark is a sufficient signing of a will has long been settled. *In Re Bryce*, 2 Curt. Eccl. Rep. 325. It is immaterial whether the testator can write or not. *Baker* v. *Dening*, 8 Adol & El. 94. In Pennsylvania under the Wills Act of 1833 a mark was held an insufficient signing, *Asay* v. *Hoover*, 5 Pa. 21; but this was cured by the Act of January 27, 1848. Where there are both the mark of the testator and his name signed either at his request or otherwise, the mark is the signature and not the name written near it. *Jackson* v. *Jackson*, 39 N. Y. 153. However, where a statute in the jurisdiction requires that one who signs the testator's name at his request must subscribe as a witness and state the request, it has been held that when there is such a signature together with the testator's mark, the written name is the signing required by the statute and excludes the mark. *McGee* v. *Porter*, 14 Mo. 611. But if the name has been written other than by request the same Court has said that the mark is a sufficient signing. *Northcutt* v. *Northcutt*, 20 Mo. 266.

WILLS (Continued).

Passing of After-Acquired Real Property

A statute in the jurisdiction provides that every will devising in express terms or by intent all of the testator's real estate, shall be construed to pass all he owned at his death. Testator's will read: "I give * * * to my husband all my real estate * * * of which I am now possessed." Subsequent to the making of the will the testator sold a farm and purchased other real estate. *Held,* that the words, "of which I am now possessed," did not prevent the after acquired property from passing. *Hodgkins* v. *Hodgkins,* 108 N. Y. Sup. 173.

Under modern statutes in considering whether after acquired realty is to pass, the intention of the testator is to control, and that is to be gathered from the whole will. *Lent* v. *Lent,* 31 N. Y. 436. The particular combination of words found in the principal case—"all my real estate of which I am now possessed" has been construed so as not to pass after acquired property where the word "now" was used in other parts of the devise, plainly having reference to the time of executing the will. *Cole* v. *Scott,* 1 MacN. & G. 518. Similarly, where certain property which the testator at the time of making his will intended subsequently to acquire, was mentioned by name, this was held to exclude other after acquired property. *Quinn* v. *Hardenbrook,* 54 N. Y. 83. But where the word was used by itself with nothing to show that the testator meant the word now to refer to the date of making the will, it has been held, as in the principal case, that after acquired property passed. *Lent* v. *Lent,* 31 N. Y. 436.

BOOK REVIEWS.

PRACTICE IN UNITED STATES PATENT OFFICE. By E. J. Stoddard. Detroit: Drake Law Book Co. 1907. Pp. 167.

This table of cases construing and defining the several rules of practice in the United States Patent Office, will doubtless prove of value to every person interested in patent causes. The book contains nothing except a list of all the patent cases involving the rules of practice arranged alphabetically according to the name of the case. References are given to the citation in the Official Gazette and in the Commissioners' Decisions of each case wherein patent rules have been considered. The usefulness of the book would have been more than doubled without an objectionably great addition to its size, if a second index based upon a numerical arrangement according to the rule construed had been added. In order to ascertain from the present volume whether any particular rule has been passed upon, it is necessary to run through the entire book and to pick out from each page the cases affecting the rule in question.

R. D. J.

AN EPITOME OF THE LAW AFFECTING MARINE INSURANCE. By Lawrence Duckworth. Second Edition. London: Effingham Wilson. 1907. Pp. xi, 186.

In a surprisingly brief compass, the author has set forth with terseness and vigor the essential principles involved in questions arising in marine insurance cases under the law of England. His volume is primarily designed to help the busy business man who desires to obtain a concise statement of what is the meaning, measured in *results*, of any contract which he may make to guard against the perils of the sea. While the basis of the book is found in the various English statutes, yet the decisions of the courts are cited with sufficient frequency and fullness to assist materially in clarifying the subject. The Marine Insurance Act of 1906, a statute typical of the English method of law-making both as to scientific arrangement and as to accuracy of language, is printed in full as an Appendix.

R. D. J.

STREET RAILWAY REPORTS ANNOTATED. Edited by Frank B. Gilbert, Melvin Bender and Harold J. Hinman. Vol IV. Albany, N. Y.: Matthew Bender & Company. 1907. Pp. lv, 1218.

The character of this work is clearly indicated by its title.

In general no departure has been made from the arrangement of the previous volumes of the series. The opinions in the cases of greatest importance are printed in full, while the essential points covered by the judges in cases of lesser interest are made clear by brief quotations from the opinions of the courts.

An examination of the cases discloses, as might be expected, that the question of negligence in one form or another is involved in the great majority. There are, however, many cases wherein other principles of importance are discussed, as for example the question of race separation (see pages 543 sq., 136 sq., &c.), abandonment of franchises (see page 873), common use of a street by two companies, &c. One of the most important cases reported is Fidelity Trust Company *v.* Hoboken, &c., Railway Company (N. J.) (p. 738), wherein the broad principle is laid down that a mortgagee may restrain the mortgagor from leasing the premises covered by a mortgage to a competing company on a theory that such a proceeding constitutes a clear case of waste.

The index is on a purely empirical basis. For example, among the topics are to be found "Gongs," "Horses," "Last Real Chance," "Plaintiff." Under the heading "Vehicle" are placed seventy cases in which many fundamental rules of law are discussed. Such an arrangement does not commend itself as being either analytical or of as great real value as a more scientific method. *R. D. J.*

THE LAW OF CRIMES IN PENNSYLVANIA, INCLUDING CRIMINAL EVIDENCE. By William Trickett, LL. D. Two vols. Philadelphia: T. & J. W. Johnson Co. 1908. Pp. lvi, 1183.

For some reason or other the criminal law of Pennsylvania has been slighted in the past by the text-book writers. For a long time the work by Isaac H. Shields (The Penal Code of Pennsylvania, Crimes, Statutes and Decisions), which appeared in 1883, held the field alone. This book, however, was little more than an annotated digest. Then followed "Boyer's Criminal Digest" in 1892. Then Sadler's "Criminal and Penal Procedure in Pennsylvania" appeared (1903). Sylvester B. Sadler, the author, is professor of criminal law in the Dickinson Law School, and dedicated his work to the Dean of that institution, William Trickett. The latter has undertaken the present work on the substantive law of crimes in Pennsylvania to round out and complete the labors of his colleague.

It is not easy to write a text-book upon a subject so largely statutory as that of crimes which will rise above the level of a digest with the notes included in the text. The author of the book under discussion, a veteran in the field of legal text-book

writing, has overcome the difficulty. The second volume, especially, with its treatment of homicide and of evidence, is noteworthy for its broad and general treatment of the subjects there discussed.

If a text-book on a statutory subject should be more than a digest, it should, of course, be at least that. Viewing the present work as a complete treatise on the substantive law of crimes in Pennsylvania, some strange omissions are brought to the attention. Most immediately apparent on a superficial examination is the fact, revealed by the index, where the acts of assembly cited in the text are given in chronological order, that no acts of assembly enacted later than 1903 are cited. Three sessions of the legislature have since intervened and each of them has altered the criminal law of the State.

A closer examination reveals the fact that many misdemeanors are not included at all; *e. g.*, Pointing firearms, 8 May, 1876, P. L. 146; Baggage smashing, 12 February, 1870, P. L. 15; Barratry, 31 March, 1860, sec. 9, P. L. 387; Defacing walls, 8 June, 1881, P. L. 85; Posting bills on private property, 10 March, 1903, P. L. 20; Duelling, 31 March, 1860, secs. 25, 26, 27, P. L. 391. It is not to be supposed that the learned author overlooked these crimes, but as there is no key given to his method of selection, the reader who desires to know whether a given state of facts constitute a crime or not, is driven back to the standard digests as though the text-book had never been written.

More difficult to explain are the omissions of statutes relating to the graver crimes. The whole subject of counterfeiting is omitted. 31 March, 1860, secs. 156, 157, 158, 159, 166, 167, 168, 172, P. L. 420 ff.; 13 April, 1867, P. L. 1230; 8 May, 1889, P. L. 127. Embezzlement is a crime which ought to have especially full treatment, because in questions relating to it civil and criminal responsibility so often shade into one another. We note that section 115 of the Act of 31 March, 1860, P. L. 411, on embezzlement by the holder of a power of attorney to transfer property is not cited. Also omitted is the subject of embezzlement by officers of insurance companies. 11 April, 1862, sec. 1, P. L. 425; 17 June, 1878, sec. 1, P. L. 212. On the question of receiving deposits by insolvent banks the Act of 22 April, 1863, sec. 1, P. L. 562, is not given, although important in that connection.

Another grave crime which is not included is train robbery under the Act of 25 June, 1895, P. L. 290.

On the whole, there seem to be traces of hasty production about this book, but its useful features are many and it will take its place among the standard text-books of the State.

S. B. S.

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THE INTENTION AND WISDOM OF THE DIVISION OF LEGISLATIVE POWER BETWEEN CONGRESS AND THE STATES.

If there is one principle that our forefathers, founding the Constitution, had more at heart than any other, it is personal liberty,—personal liberty as guaranteed by the universal right to equal law, the laws made by their own home representative bodies, administrated in their own home courts, and based on the common law of England; and the common law of England has ever been jealous of all but common law tribunals, wholly rejects any administrative law peculiar to the government as is known in continental countries, and abhors any tribunal, board, or commission, drawing its authority from the Executive, and which, while not a proper court of justice, undertakes to settle judicial questions.

To secure all this, the great principle of the separation

NOTE.—This article formed the subject of an address delivered by Mr. Frederic J. Stimson before the Society of the Alumni of the Law Department of the University of Pennsylvania at their annual meeting on Friday, April 10th, 1908, and is published through his courtesy and kind permission.

of the powers of government was adopted and carried to its full extent. In the splendid words of the Massachusetts Bill of Rights:

"In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men."

The cardinal liberties secured by the Bill of Rights are put forever under the aegis of State legislatures and local common law courts and their independence from the Executive duly secured. And furthermore, we have the State autonomy forever secured by the independent, indestructible State, as well as by the separation of the three powers in both State and nation. And of these cardinal rights, no man may be deprived but by twelve men of his equals in his own country, nor, in criminal causes, be deprived for one day of his personal liberty, but by a finding of twenty-three of his neighbors that there is probable cause for holding him guilty of crime. The totality of all these principles we will sum up in the convenient phrase "local self-government",—but remembering that this phrase means much more than administrative government alone.

To show how strong was this feeling, we will read from a few of the earliest State constitutions adopted both before and after the Federal Constitution of 1789; first that of Pennsylvania, September 28, 1776; then in the same year, that of Maryland, November 11, 1776, and North Carolina, November 18, 1776, and of Vermont, 1777.

"That the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof."

In the same year is that of Connecticut:

"This Constitution adopted by the people of this State, shall be and remain the Civil Constitution of this State, under the sole authority of the people thereof, independent of any King or Prince whatever. And that this Republic is, and shall forever be and remain, a free, sovereign and independent State, by the name of the State of Connecticut."

In 1780, we have the constitution of Massachusetts and in 1784 that of New Hampshire.

"The people of this commonwealth have the sole and exclusive right of governing themselves as a free, sovereign and independent State and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress assembled."

And for an example of a later constitution, we have that of West Virginia, in 1872.

"The government of the United States is a government of enumerated powers, and all powers not delegated to it nor inhibited to the States are reserved to the States or to the people thereof. Among the powers so reserved by the States is the exclusive regulation of their own internal government and police, and it is the high and solemn duty of the several departments of government created by this constitution to guard and protect the people of this State from all encroachments upon the rights so reserved."

Solicitude for local courts apart from the centralized courts even of our own government reaches right back to Magna Charta.

(Chapter 17) "Common pleas shall not follow the King's Court, but be held in some certain place."

(Chapter 20) "Fines to be assessed by honest men of the neighborhood."

"The writ called Praecipe shall not in future be issued, so as to cause a freeman to lose his court."

So in the Virginia Bill of Rights, he must be tried by a "jury of his vicinage," and the Maryland Constitution of 1776 says:

"That the trial of facts where they arise is one of the greatest securities of the lives, liberties and estates of the people."

And this is repeated in the Massachusetts Declaration of Rights and expressly recognized in the Federal constitution, Article 3, Section 2, providing that all trials shall be held in the State where the crime is committed and shall be by a jury; and in the Sixth Amendment the venue is further limited to the district where the crime is committed; and

by the Seventh Amendment the right of trial by jury is preserved also in civil cases and the Federal power is forbidden to retry any cause other than according to the rules of the common law.

And the separation of the powers is shown expressly in ten out of the thirteen of the first constitutions of the original States and is to-day recognized in every single one of the States of the Union with the solitary exception of the State of New York.

But the English principle of local liberty, local parliaments and county courts, and the control by the people at home of their own affairs, became to the thirteen colonies far more important; for instead of a small homogeneous country like England, they had, even in 1776, a country reaching from the sub-Arctic to the torrid zone, from ocean to prairie, with different climates and different institutions, made up of five different races, even if we count Scotch and English and Irish as one, and with at least four mutually hostile religious faiths; with a social system in the South as different from that in the North as black from white; and all the colonies agreeing only on this one thing, to preserve the cardinal liberties of the Bill of Rights. How reconcile these local liberties, this government by the people of their own affairs, with that strong yet far off central government they were about to create in order to regulate their foreign relations and the affairs that they deemed of national concern? Yet the experience of the Revolution showed that such a government was necessary.

It is a familiar truth that this reconcilement of national power with local liberty was their great invention; a strong central government for political, national affairs, working directly on the people, not, as in all previous confederations, on the component States; conjoined with absolute autonomy as to the making and the judging of laws, and the administration of their own affairs at home; also the control by the people of each State of the great money power, of the raising and expending of practically all the taxes, leaving the national government to support itself by indirect taxation only and

the taxes to be imposed upon foreign commerce. I have not time to dwell on this point, which is familiar to all of us; I hasten to consider the actual division made by the founders of the American Republic of all sovereign power between the States and the central government. This is the special subject, I ask you to reconsider to-day; in a day when all things, even constitutional principles a thousand years old, must justify themselves to us anew.

Now if you will draw a sphere to represent the total domain of sovereign power under a constitutional republic, you have at once suggested our first distinction. For our governments, both State and national, must always remain republican and constitutional. They are not meant, as now seems to be thought, only to enforce the will of the majority, but in certain things to protect the minority, as well, and to guarantee forever free government and private rights. There is a vast domain of unlimited, sovereign, autocratic, imperial power, outside of this sphere, that may stand for those powers of conquest and oppression which are outside a" ' -v and may be wielded by an oriental despot or a European peror; but these powers remain outside our constitution. Our forefathers intentionally and forever excluded them, withheld them from any and all governments they were about to create, Federal, State, or both together. Undoubtedly the people can set aside this constitution, and establish, if they like, an empire or an oligarchy; but until they do so, it is treason in any one to attempt it and a breach of the oath of every Federal officeholder, judical or executive.

As the king himself exists but by the law, so the Federal government is the creature of the Constitution. And this after all is really our greatest contribution to the history of humanity; the American people, forming a great nation, a sovereign people, forever denying to themselves and their own government imperial power, limiting it to be republican in form, their own legislatures to a written constitution, and both forever by the rights of each free man.

Now between the central government and the State, how did they in fact divide the constitutional powers of government; these that are represented within this sphere that I have drawn? Let us first draw a zone A to represent the powers they granted to the nation and the Federal governments. Let us now draw a zone B to represent the powers given or reserved to the States. Where they cross, the segment AB will exactly represent the powers shared by both—where State and Federal jurisdiction coincide.

But this is a government not only of delegated but of limited powers. Large prohibitions were imposed upon the Federal government. Let us represent these by the zone X, and draw that farthest away from the zone A where we have put the powers allowed. And many such prohibitions were imposed, even in the Federal Constitution, on State governments or legislatures also; let us represent these by zone Z, farthest from zone B, the zone of the States' Rights. And in like manner, where those zones of prohibition cross, we shall have the double prohibition on both State and nation represented by the segment XZ, those great rights which the people chose to protect from either government.

Now, lastly, we have a central area left unnamed. What may be the meaning of this? The answer is obvious. This is the most important of all; for it is that vast realm of sovereign power reserved to themselves by the people, virgin yet, delegated by them neither to the State nor to the nation, kept in their own hands until such time as, by amendment to the Constitution, and by amendment only, they, the people, might choose to give them up. The things belonging to this area resemble those in the area XZ, the powers forbidden to the nation and the States, for powers forbidden are necessarily reserved; but in Y we will class those powers which, such as we find in the Ninth and Tenth Amendments, are by express words reserved to the people or to the States; the great principles of the Bill of Rights, the right to law and to equal law, the right to property, the right to vote their own taxes, those taxes to be for the benefit of all

and to be expended by the people who pay them, the right to a republican form of government, in both State and nation, to be administered by the people themselves, or by officers who are their trustees and servants and are elected by popular suffrage; by an Executive who is not to be left in power one year without a meeting of the legislative branch; by an army that may not be maintained two years without a new vote of Congress; by judges, who, that they may not be dependent on the Executive, are appointed for life, and paid a salary that may not be reduced by Congress. These are a few of the principles that remain in the great central area Y, of which the States and people may never be deprived.

Now observe—this area we call Y, the central realm of the people's rights, alone is unlimited and indefinite; for it represents all the sovereign power in the world, *that remains*, —all that remains of all possible power of free government when you have granted away the eight definite subtractions of these other zones. Take eight from infinity and infinity remains. All other powers are definite, limited, defined; the people's powers alone are not.

But coming lastly to our special theme, there are two segments that I have not mentioned, AZ and BX. AZ where the zone of what is forbidden to the States cuts the zone of what is permitted to the nation; the area of absolute Federal power given to the nation, and at the same time denied to the States,—here, under the Constitution, is the realm of centralization, of imperialism. For what is in the rest of our zone A expresses powers which are merely *permitted* to the nation, not necessarily denied to the States; and this little difference between A and AZ is therefore to be one great problem of American Constitutional law. So, in like manner, in B simple, we shall find what the States may do and the nation also; while that part of B which is crossed by X represents all that is *withheld* from the Federal Government. Here therefore is the scope and realm, the home-ground, of what we call States' Rights. Let us not be prejudiced against

them because the term is identified in our memories with the heresy of secession; purged of that fault, we may live to see that the cry, "States' right," embodies our truest liberties.

Now on these two qualifications hang all the law of our Constitution. If you can say what is to be AZ, and what is A; for instance, whether all corporations or industries are to be solely under Federal control or also under the power of the States—if you can tell what is to be BX and not B simply; for instance, whether the rights of property, trade, taxation are to be solely under the State or to be controlled by the nation—you shall tell me the future of our republic.

The Federal powers are political; that is the great criterion The State powers, on the other hand, are domestic, social. They relate to the relation between a man and his fellow men, to his control over his own property, and to the trial of his disputes with his neighbors, of his controversies with all except the Federal Government and of all his crimes or offences except only those which, like treason, relate directly to his duty to the Federal Government, or are committed in the places subject to its exclusive jurisdiction, such as forts, military reservations, national territory not incorporated into a State, and the high seas. The Federal Government is a political sovereign; but has almost none of the attributes of sovereignty for any other purpose. This broad fact is revealed to us with startling clearness when we note that it has generally neither the power of capital punishment nor, in effect, of direct taxation. It would be hard to find two more necessary attributes of sovereignty as commonly understood in the science of government, than the power over life and the power over property. Moreover, except for special purposes of national defense, etc., it cannot hold any land. Even its political power is far less than is commonly enjoyed by sovereign nations; it cannot, for instance, cede territory from any State. Moreover, our national sovereign is controlled by the most fundamental of all limitations. It may not, under the Constitution, that is to say, without going back to the people, which it rec-

ognizes as the only source of power—change its form from a republican form of government not even to a pure democracy. It is even possible, under the Fifth and Fourteenth Amendments, that it may not adopt a system of socialism or communism, or permit a State so to do.

To see how completely this division between what is political and what is social, domestic, or relating to private right is carried out in the Federal Constitution, it will repay us to run over its provisions in some detail. The Preamble relates both to social and political objects, such as the common defense, but lays down at the beginning the great principle that it is the people and not the States who made the nation and the constitution. The first two sections of Article I relating to Congress are political. Section 3 forbids all direct taxes; that is, all taxes directly imposed upon property or individuals, except they be apportioned to the States according to their population and not according to their wealth. This not only is, but was intended to be, in effect a prohibition to the Federal Government of the power of direct taxation. All the rest of the first seven sections are also political; relating generally to the organization, election and liberties of the Congress, and the method of legislation. Section 8 of Article I contains almost the only powers given to the Federal Government which may, under our division, be called social; and while no one would desire to change the Constitution in this particular, it is highly significant that this exception has given rise to most of the litigation, most of the discussion, and to the leading division between the two great political parties today. That is to say, while the object of the Federal Government is to protect the nation from attack and manage its foreign affairs and impose taxes therefor "for the common defense and general welfare of the United States", the lesson of the existence of the thirteen States under the Confederation showed that they could not be trusted with the regulation of commerce passing from or to other States crossing their borders. This, therefore, was denied to the States, and necessarily left to the Federal power; doubtless, however, rather with the intention

of preventing the States from interfering with such commerce than allowing the Federal Government to do so. Then, Congress is authorized to make a uniform bankruptcy law throughout the United States; the only matter in which the necessary advisability of uniform laws was recognized in the Constitution and expressly given to the Federal Government; and the power to establish post offices and post roads and issue national patents and copyrights, being a usual national power, is hardly an exception to our rule. Yet these matters, until we come to the Fourteenth Amendment, are the only subjects in which the Constitution clothes the Federal Government with any power relating to the citizen's individual affairs and his private business.

But even the political powers are not broadly given. The eight clauses of Section 9 in the first article consist entirely of negations; and there are many others. On the other hand, the entire sovereignty of the State over individual relations, social and domestic affairs, and property rights is shown by the very few restrictions and exceptions we can find in the Federal Constitution. And these exceptions are purely political.

National political powers, as well as powers of taxation, or relating to interstate or foreign trade, are, of course, forbidden to the States. Article II relates entirely to the Federal executive power and is entirely political; Article III to the Federal judicial power; and here the only time when the national courts may be invoked other than to interpret and define the Federal Constitution and laws is to guarantee a fair trial in an impartial tribunal between citizens of different States. Article IV, Section 2, does indeed, provide that a citizen of one State shall have all the social and contractual rights that are given in any other State to the citizens thereof; but this can hardly be said to give the Federal Government any power over social matters; rather it merely guarantees the right to law in each State to all citizens of other States, much as the Fourteenth Amendment later does to all citizens of the United States, and even as Henry II guaranteed it to all free men of England. Over the territories in-

deed, Congress is expressly given full power, social and domestic as well as political; but it is only of late years that it has generally exercised it in any other way than to erect territorial legislatures; and in the older territories, at least, there is no meddling with individual rights.

The first eleven amendments are *all* restrictions; that is to say, they are at great pains expressly to withhold all social and domestic affairs, or cardinal liberty rights, from the Federal Government, and even some that are political; the first ten, therefore, showing a strong reaction in favor of the rights of the States and the liberties of the people, in 1791, while the eleventh Amendment was a still more decisive step in that direction, withholding all Federal judicial power where a State was directly concerned; much as James I endeavored, through vainly, to get Chief Justice Coke to rule that he would not consider a case where the interests of the King were involved. The Thirteenth Amendment is striking in that it is the only instance where the Constitution is expressly extended to any place subject to the jurisdiction of the United States, and where, as it has recently been put, "The Constitution follows the flag". Slavery, therefore, can exist nowhere, not even in the Sulu Islands; although even the other cardinal requirement, a republican form of government, may constitutionally be withheld from them as from the other territories.

The modern reaction in favor of the Federal power is shown first in the Fourteenth Amendment proclaimed July 28th, 1868, though the interpretation which might have revolutionized the whole State and Federal system has substantially been denied by the Supreme Court. The Amendment does, however, and for the first time, interfere between the State and the individual, if not between the individual and his neighbors. The State is forbidden to deprive any person of life, liberty or property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws, and this directly by the Federal Government. The radical upholders of centralization, in reconstruction times, undoubtedly believed that this brought the

hand of the Federal Government between a man and his neighbors and indeed all his private affairs; otherwise it would be surprising that it took nearly twenty years of great decisions by the Supreme Court to read the amendment in strict accordance with its simple words—that it applied only to a State and to due process of law of a State; that it did not, as had been done in early times after the Conquest, give the Norman Court, the centralized government, jurisdiction of all matters and causes on the mere plea of Englishry, or that a Norman was concerned. As it has therefore worked out, it is merely a new national guarantee, like that securing a republican form of government, of the cardinal liberty and property rights against law-making by the States; and it does not, under the plea that a person is being unfairly treated by a neighbor or an official, drag all matters of ordinary trade and private right into the Federal courts.

Whether the extreme interpretation of the interstate commerce clause now proposed will carry us to this length it is too early now to say; nor, indeed, is this a controversial essay. That there has been for some years a decided trend in that direction, one must admit. The history of the interpretation by the courts and by Congress of the words "regulate commerce among the several States" has been to extend the meaning of commerce from the things transported, the physical instrumentalities of interstate commerce, the necessary documents concerning it, to the corporations and persons conducting it, the conditions of their labor and the rates they may charge—this by the year 1908—and of the words "among the several States" from the natural physical transportation across State lines to a combination or contract made in one or more States intended to act in others or in effect carried out in others.

It is perhaps obvious that we intend to withhold the right of conducting interstate commerce from any *corporation* not conforming to a Federal standard. Whether we shall go further and deny it to individuals; whether, indeed, Congress has the constitutional right to deny it to indi-

viduals; and whether, on the other branch of the definition, we shall extend it from commerce, in the sense of interstate traffic, to manufacturing, mining, or producing goods intended to be sold outside of the State where they are manufactured, mined or produced; and to the returns, or the profits, or the fortunes, or the disposition of the fortunes, derived therefrom; and still more, to the contractual relations, the conditions of labor, etc., of the persons so engaged,—are all matters for the future to settle.

The power of suspending laws or their application, or agreeing not to prosecute in certain cases or to pardon certain offenders, is a dangerous one in the hands of the Executive. Moreover, there is an increasing tendency today in Congress to grant legislative power to the Executive or to boards or commissions of his appointment. Notably has this been done in recent years in the case of making treaties, fixing customs duties, the rates of railways, and in the control of corporations,—all properly legislative matters. The excuse made is that Congress declares the general principle and the act of the President, for instance, in finding a state of affairs to exist upon which he may ratify a treaty or proclaim a commercial arrangement, is merely ministerial. An example of the length to which this theory may be carried is found in the recent railway regulation act or Hepburn Bill, where Congress merely proclaims that the rates shall be reasonable and without discrimination,—both mere expressions of the common law,—and leaves the determination of what is reasonable between the Interstate Commerce Commission and the Supreme Court, neither of them legislative bodies. The common law may, indeed, be decided by a judicial body; but it is difficult to see why the alteration of the common law is not legislation. When, therefore, the commission fix a "just and reasonable" rate,[1] if they are applying the common law, their act is judicial; if they are fixing other standards, it is legislative. Federal judges have

[1] U. S. Act of February 4, 1887, as amended June 29, 1906, Section 15.

consistently, from the beginning, refused to exercise other than judicial functions.

The leading modern English historian ends a long account of the attempted centralization of English administration under the Norman kings with the boast that from that time on until now there is no body of ten thousand English speaking men in the world, which is not governed by the laws that they make themselves.

I believe that the constitutional decisions of the next ten years will prove the most important in the history of our own republic. It is peculiarly the duty of those of our profession to point out the dangers that beset the path upon which the people may wish to go. Legislation is now pending in Congress which seems to me to be more radical, more un-English than anything that has been enacted in an English speaking legislature for many centuries. It has been the proud boast of the great statesmen and lawyers of England that we have no administrative law, no law peculiar to the government or administered by government officials, but that every officer, civil or military, must answer for his acts in the common law courts, and that every individual or association of individuals has the right to have their legality tried there, and tried there alone. To submit the judgment of the great right of freedom of contract and association to the judgment of an administrative official would be well on the road to the introduction of the whole European system of administrative law and government by bureaucracy. When a man is responsible for his acts or contracts not to legislatures or courts and juries, but to executive officers, you cease to be American and become European, if not Oriental, and when you give up your care for local self-government and your home courts and juries, you are not far from the state of the kingdom of Italy or the Empire of Russia, where a mighty central government stretches its paralyzing hand between the laborer and his daily bread, the merchant and his trade, the citizen and his vote.

F. J. Stimson.

WHEN IS A BANK THE BONA FIDE OWNER OF A CHECK LEFT FOR DEPOSIT OR COLLECTION?

The boundary of our inquiry may be more closely defined by leaving out all cases that were the subject of special agreement,[1] or that were so endorsed by the depositor as to retain intentionally his ownership.[2] These include a large number and involve the application of no principle save the most general one, that the agreement must be founded on proper authority, or be within proper legal limitations.

At the outset, it may be stated that the courts have always maintained that the title to checks deposited by, and credited to, a depositor who is a contemporaneous debtor, passes at once to the bank absolutely.[3] This principle is so strongly fortified by reason and precedent that the mere statement of the rule will suffice.[4] For the same reason, after an advance has been made thereon, the bank becomes either the absolute owner or a lienor for the amount of the advance.[5] The rule is equally clear that a depositor who is credited with a check, and not as cash, retains his

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[1] *Richardson* v. *Louisville Bkg. Co.*, 36 C. C. A. 307; *First National Bank of Elkhart* v. *Armstrong*, 39 Fed. 231 (C. C.); *Manufacturers' National Bank* v. *Continental Bank*, 148 Mass. 553.

[2] *Beal* v. *City of Somerville*, 1 C. C. A. 598; *Levi* v. *Bank*, 5 Dill 107; *First National Bank* v. *Reno Co. Bank*, 1 McCrary 491; *Sweeny* v. *Easter*, 1 Wall 166; *White* v. *National Bank*, 102 U. S. 658; *Cecil Bank* v. *Farmers' Bank*, 22 Md. 148; *Mechanics' Bank* v. *Valley Packing Co.*, 70 Mo. 643; *Milliken* v. *Shapleigh*, 36 Mo. 598.

[3] *Titus* v. *Mechanics' National Bank*, 35 N. J. Law 588, 592.

[4] *Balbach* v. *Frelinghuysen*, 15 Fed. 675, 682; *Armstrong* v. *National Bank of Boyertown*, 90 Ky. 431; *Taft* v. *Quinsigamond National Bank*, 172 Mass. 363.

[5] *Metropolitan Nat. Bank* v. *Loyd*, 90 N. Y. 530; *Armstrong* v. *Nat. Bank of Boyertown*, 90 Ky. 431, 436; *Balbach* v. *Frelinghuysen*, 15 Fed. 675; *Scott* v. *Ocean Bank*, 23 N. Y. 289; *Giles* v. *Perkins*, 9 East 12, 14.

ownership.[6] And, likewise, a depositor who is credited with a check provisionally in anticipation of payment, but having no right to draw against the sum credited.[7]

We now approach the class of cases that are the special subject of inquiry—those that are deposited and credited to the depositor *with the right to draw immediately for the amount of the credit.* Some courts have held that the ownership was not transferred by such action on the part of the bank; other courts have maintained the opposite ground. The unquestioned tendency is to hold that the effect of such a transfer is to vest their title in the bank. The highest court in the land recently adopted the rule, using the form of expression by the Court of Appeals of New York, which said:[8] "The general doctrine that upon a deposit made by a customer, in a bank, in the ordinary course of business, or of money, or of drafts or checks received and credited as money, the title to the money or to the drafts or checks, is immediately vested in and becomes the property of the bank, is not open to question."[9]

It follows that, if the title thus passes to the bank, the depositor's control over them ceases. Suppose a depositor should wish to recall a check before collection on which no advance has been made, would the bank surrender it? Would it surrender a note that had been discounted, the

[6] *Bailie* v. *Augusta Sav. Bank*, 95 Ga. 277, 280; *St. Louis and San Francisco Railroad Co.* v. *Johnston*, 23 Blatch. 492; *Thompson* v. *Giles*, 2 Barn and Cres. 422.

[7] *Midland Nat. Bank* v. *Brightwell*, 148 Mo. 358; *Freeholders of County of Middlesex* v. *State Bank*, 32 N. J. Eq. 467; *Beal* v. *City of Somerville*, 5 U. S. App. 14; *Hazlett* v. *Commercial National Bank*, 132 Pa. 118; *Rapp* v. *National Security Bank*, 136 Pa. 426; National Butchers' and Drovers' Bank v. *Hubbell*, 117 N. Y. 384; *Richardson* v. *New Orleans Coffee Co.*, 43 C. C. A. 583; *First National Bank of Trinidad* v. *First National Bank of Denver*, 4 Dill. 290; *Levi* v. *National Bank of Missouri*, 5 Dill. 104; *Armstrong* v. *National Bank of Boyertown*, 90 Ky. 431, 437; *Midland National Bank* v. *Brightwell*, 148 Mo. 358.

[8] *Cragie* v. *Hadley*, 99 N. Y. 131.

[9] *Burton* v. *United States*, 196 U. S. 283, 302, citing *Thompson* v. *Riggs*, 5 Wall 663; *Marine Bank* v. *Fulton Bank*, 2 Wall 252; *Scammon* v. *Kimball*, 92 S. C. 362, 369; *Davis* v. *Elmira Sav. Bank*, 161 U. S. 275, 288; *Acbi* v. *Bank of Evansville*, 124 Wis. 73; *Flannery* v. *Coates*, 80 Mo. 444; *Ayers* v. *Farmers' and Merchants' Bank*, 79 Mo. 421.

amount of which had been credited to, but not drawn by, the depositor, on the maker's request? If the title to the checks thus passes to the bank on crediting them, then it follows that if the bank afterward re-delivers them to the depositor at his request, this is done as a favor, and not as a right.[10] Surely, absolute ownership by the bank is inconsistent with the right of recall by the depositor.

Clearly established as the rule is, there certainly are some serious difficulties with the foundation on which it rests. There is no consideration for the transfer of the title unless this be the right to draw the money represented by the checks. This, however, is a shadowy thing, for unquestionably the bank has a right of withdrawing that credit at any time before the depositor has used it. The depositor, therefore, receives at most a qualified right to draw which may be defeated by the sole action of the bank. Furthermore, if the bank had not the right to withdraw its credit, it would hardly dare make such an advance, for the act of the bank rightly considered is a loan, or rather an agreement to lend, for such a period of time between the actual deposit and collection of his checks as the depositor may desire.

The right to cancel the credit has led some courts to hold that a transfer was not effected by crediting; in other words,[11] that this right was inconsistent with absolute ownership; but more frequently the courts have held otherwise.[12] In a well reasoned case decided by the Supreme Court of Kansas, it was said: "It may be conceded that if, after due and legal effort to collect a check, it should be dishonored, the bank would have the right to charge the amount of it to the depositor's account. Whether this

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[10] *Metropolitan National Bank* v. *Loyd*, 90 N. Y. 530, 535.

[11] *National Butchers' and Drovers' Bank* v. *Hubbell*, 117 N. Y. 384, 393, 394.

[12] *Ayres* v. *Farmers' & Merchants' Bank*, 79 Mo. 421; *Flannery* v. *Coates* 80 Mo. 444; *First Nat. Bank of Elkhart* v. *Armstrong*, 39 Fed. (C. C.) 231, 233; *Riverside Bank* v. *Woodhaven Junction Land Co.*, 34 N. Y. App. Div. 359.

right may be said to rest merely on the custom of banks, or whether the custom has been crystallized into a rule, and the right now may be said to be an implied condition attaching to the transfer of the paper, makes no difference. It is, nevertheless, in strictness, the right of an endorsee against an endorser, and hence is not, in any sense, inconsistent with ownership."[13]

On three grounds, then, the right of ownership may be maintained with the right of charging a check back if it is not paid. First, the right is not absolute in a technical sense. Though that word has been occasionally used by the courts in that connection, yet it has been used inadvertently, since absolute ownership and the right of charging back are manifestly inconsistent. The courts have doubtless meant essential or conditional ownership, since the occasion for charging checks back rarely occurs, considering the vast use of checks in modern society. Second, if a check could not be charged back, a depositor would ordinarily save nothing, since he would be liable on his endorsement. This is a liability independent of the transfer by the depositor of ownership to the bank. But as the legal enforcement of this right by suit may be prevented by permitting the collecting bank to charge the check back, this can be done.[14] Third, as the seller of personal property impliedly warrants the title, the purchaser is no less an absolute owner because he has redress against the seller should his title fail.

But if the title is absolutely transferred to the bank by crediting with the right to draw, in the technical sense in

[13] *Noble* v. *Doughten*, 72 Kan. 336, 345.

[14] In *Metropolitan Nat. Bank* v. *Loyd*, 25 Hun. 101, 106, Daniels, J., said: "As this check was transferred to and received by the bank it became its property, and the fact that it had the right in case of nonpayment, upon presentment, to charge the amount of it back in the account of the customer, did not change the nature of the transaction through which it was received, for that right resulted, not from any agreement existing between the parties upon the subject, but from the rights which the bank might derive from proceedings afterwards taken to charge the depositor as the endorser."

which the term "absolute" is used, then the right to charge the check back if the collecting bank fails without any negligence on its part to complete the collection, clearly does not exist. This is a logical rule and has been upheld by the Supreme Court of Massachusetts. Nevertheless, a bank has a remedy on the depositor's endorsement, for this is an independent liability. On the other hand, the Supreme Court of the United States has declared that "the mere credit of a check upon the books of a bank, which may be cancelled at any time, does not make the bank a bona fide purchaser for value."[16] This may be easily reconciled with the rule in the Burton case by also holding that technically when the ownership of a check passes, it cannot be charged back. Yet doubtless that court would hold, as the courts in New York, Kansas and other States have held, that as the depositor is liable on his independent contract of endorsement, the easier way of adjusting the difficulty is to permit the collecting bank to charge back the uncollected check.

By such an interpretation of the decisions, they can be harmonized with the rule that prevails when a note is discounted for a borrower who is credited with the amount. On such occasions, it has been decided that a bank is not a bona fide holder until it has paid the money. Let us begin our review with Daniel: "The apparent purchase must have been a purchase in fact and not a mere bookkeeping entry. Mere discount and credit do not of themselves constitute a bona fide purchase for value. To occupy that position, the holder must actually have parted with something of value for the note."[17] In the American and English Encyclopedia of Law,[18] it is said: "Where a bank discounts paper for a depositor who is not in its debt and gives him credit upon its books for the proceeds of such paper, it is not a bona fide holder for value, so as to be protected

[16] *Taft* v. *Quinsigamond Nat. Bank*, 172 Mass. 363, 366.
[17] Neg. Inst. Sec. 779 b. 5th Edition.
[18] Vol. 4, 2d Edition.

against infirmities in the paper, unless, in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. Such a transaction simply creates the relation of debtor and creditor between the bank and the depositor."

Passing from these statements of text writers to original sources, ample confirmation is found. In *Central National Bank* v. *Valentine*,[19] the Court said: "The plaintiff by its president discounted the notes and gave the makers credit on the books of the bank for the amount, no money was actually paid or thing of value parted with by the plaintiff upon the strength of the endorsement or the discount. Under such circumstances, the plaintiff cannot be regarded the bona fide holder of said notes for value. * * * The mere giving of credit by entering the amount on the books and not actually parting with a dollar upon the strength of the endorsement, cannot be regarded parting with value in the sense in which the law contemplates. The parties in whose favor the credit was given might never draw or appropriate any portion of the fund."

Fifteen years afterward, the same court said in a case of similar character: "The bank could not become a holder for value of the note by crediting its amount to the cashier. Unless he received the money as an individual, and not as cashier, the bank parted with nothing as a consideration for the note."[20] And in a still later case, the same court declared concerning a note which had been discounted for the payee who had been credited with the proceeds on the books of the bank: "The plaintiff must have actually paid out and parted with the proceeds of the discount before it could acquire an indisputable title thereto."[21] One more citation may be given from the court in the same State; the Appellate Division decided three years ago: "A bank is

[19] 18 Hun. 417.
[20] *Dykman* v. *Northbridge*, 80 Hun. 258.
[21] *Sixth National Bank* v. *Lorillard Brick Works Co.*, 46 N. Y. St. Rochester 235.

not a holder of a note in due course as defined by the Negotiable Instruments Law (which in this regard, follows the common law), when the proceeds of the note are simply credited to the person from whom it was purchased.[22]"

It may be further noted that the tribunals of the State which maintain the rule concerning the bona fide ownership of a note that is discounted by a bank which credits the proceeds to the borrower, are the same tribunals which first clearly established the rule concerning the ownership of checks credited to depositors with the right to draw immediately against the amount credited. This was done in *Metropolitan National Bank* v. *Loyd,* by the Supreme Court of New York, whose decision was affirmed by the Court of Appeals and has been often cited to sustain later decisions. Said the Supreme Court in that case: "By the acceptance of the check by the bank receiving it as so much money, it became the debtor to the customer to the extent of the amount credited on account of it. And while he did not draw checks or drafts against it, but the bank was largely his debtor, he still had the right to do it if he had been so disposed. The account, including the amount of the check, stood with his assent as so much money subject to his disposal, and because of that circumstance, he ceased to be the owner of the check, and the title to it became vested in the bank or its own property and subject to its risk in case of loss."[23] This principle has been often affirmed both by the courts of New York and by those of other States.

Other States have maintained the same rule concerning notes discounted for, and credited to, the account of depositors. One of the latest deliverances is by the Supreme Court of Iowa, in which the court says: "If a bank discounts paper for one of its depositors, giving him credit

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[22] *Albany Co. Bank* v. *People's Ice Co.*, 92 App. Div. 47, 55; *Clarke National Bank* v. *Bank of Albion*, 52 Barb. 592; *Nat. Bank of Barre* v. *Foley*, 103 N. Y. Supp. 553.

[23] *Metropolitan Nat. Bank* v. *Loyd*, 25 Hun, 101, 105, affd. 90 N. Y. 530.

therefor upon its books for the proceeds, it is not a bona fide holder unless some other and valuable consideration passes."[24] The Courts of Michigan,[25] Wisconsin,[26] Kansas,[27] have announced the same rule.

In a recent New York case, there is a disposition to bring the check rule into more perfect harmony with that which applies to notes discounted for, and credited to, depositors. After setting forth the four elements needful to constitute a bona fide purchaser by the Negotiable Instruments Law, and that one of these is that the Instrument must have been taken in good faith and for value, the Court says: "The authorities hold that the mere crediting to a depositor's account, on the books of a bank, of the amount of a check drawn upon another bank, where the depositor's account continues to be sufficient to pay the check in case it is dishonored, does not constitute the bank a holder in due course."[28]

This clearly marks a departure from the rule in the *Loyd Case*, and rests on a different foundation. The change of ownership of the check in the *Loyd Case* rested on the crediting of it as cash with the immediate right to draw for the amount, without the slightest regard to the condition of the depositor's account. In the *Cowles Case*, such a crediting with the right to draw did not change the ownership of the check, if the depositor's balance was adequate to pay the amount of the check thus credited, had it been drawn out regardless of the credit thus given.

Does not this rule rest on a more rational foundation? Indeed, is there any valid reason for applying a different rule to checks that are credited to their depositors as cash than is applied to notes that are discounted for and credited to depositors? The transactions are similar in every essen-

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[24] *City Deposit Bank* v. *Green*, 130 Iowa 384; *McKnight* v. *Parsons*, 113 N. W. 858.
[25] *Drovers' Nat. Bank* v. *Blue*, 110 Mich.; 67 N. W. 1105.
[26] *Manufacturers' Nat. Bank* v. *Newhall*, 71 Wis. 309.
[27] *Mann* v. *Second Nat. Bank*, 30 Kans. 412.
[28] *Citizens' State Bank* v. *Cowles*, 180 N. Y. 346, revg. 89 Ap. 280.

tial respect. In both, the depositor has a right to draw when he pleases; in both, the debtor and creditor relation exists between him and the bank with respect to the deposit. In the one case, the bank owns or holds the depositor's note; in the other, his check. Its right and control over the one instrument is as perfect as its control over the other. The note can be given up before the money is drawn if the depositor should become insolvent, or, if it was forged, or possesses other infirmity not known when it was received, and the credit can be cancelled. A check can be returned if it was forged or otherwise imperfect, and should prove to be uncollectable after using the legally required diligence.

May not the decision in the Cowles case be regarded as a return to a more rational view concerning the ownership of a check credited to a depositor with the right to immediate payment? In other words, so long as a depositor checks against his actual cash deposit, he is not borrowing, and the bank is not the bona fide purchaser of checks credited to him, but not collected. When his checks go beyond this line, then the bank becomes the owner either absolutely, or to the extent of its lien.

Albert S. Bolles.

SIR MATTHEW HALE.

Sir Matthew Hale was born nearly 300 years ago, on November 1, 1609. Milton was born in the previous year, 1608, and both Milton and Hale were born as they say in England, in the middle rank. He was not descended from the highest, nor from the lowest class in the State, but from the class between them; that great middle class that does the most of the world's work.

His father was a lawyer, but he quit the profession, because he considered that its forms, in some respects, were contrary to the dictates of conscience. "Giving color," that is, the introduction of "feigned matter" in a plea, he objected to as being little better than downright lying. He retired into the country, and lived upon his landed estate until his death.

His son grew up under the influence of Puritanism, which before and after the death of Queen Elizabeth, and she died only six years before his birth, was rising to great power in both English politics and religion. And Puritanism was founded upon the Bible; the most diversified and interesting book, it has been said, in the world.

Its translation into English in the time of Elizabeth, unlocked a treasure house for the great body of the English people. While scholars, the gentry and the Court were reading the Greek and Roman classics, as well as Spenser, Marlowe and Shakespeare, the unlearned masses were imbibing with enthusiasm, with unabating fervour the noble literature of the Bible; the literature of religion. The effect was marvellous; it was well-nigh miraculous. Biblical stories, the words of psalmist, prophet, and evangelist,

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NOTE.—This article is the substance of a lecture recently delivered by Mr. Flanders before the students of the Law Department of the University of Pennsylvania. It is now published through the kind permission of the lecturer.

stirred the people like the notes of a trumpet. As an English historian has said, England became the people of a book.

And that book revolutionized their thoughts. It changed their character, habits, and even their demeanor, which now became solemn, formal, and precise. It affected also, their speech, scripture words and phrases, more or less, pervading it. They gave scripture names to their children, and brought them up under a system of rigid discipline. They denounced sports, the theatre, dancing, and amusements generally, as being not only idle and frivolous in themselves, but as evidence of a corrupt nature.

Matthew Hale's father was a Puritan, but he lost both father and mother before he was five years old. His uncle and guardian, who was also a Puritan, placed him under the charge of a Vicar of the Church of England, who was noted and satirized for his Puritan sympathies and convictions. This uncle intended his nephew for the ministry, and his education was conducted with that end in view.

At seventeen, he was tall, strong and vigorous, and at that age, was entered at Oxford, as a student. He pursued his studies there with diligence, was regular in his attendance at chapel and prayer meetings, and observed the strict decorum and habits that characterized the persons who were called Puritans. And by Puritans, I mean those people who, at that time, were members of the established Church of England, but who, nevertheless, sought to reform it, both as to doctrine and ritual. They wanted purity of life, and simplicity of worship.

And in this sense Hale was a Puritan.

At length, however, a change came over him; a company of strolling players appeared at Oxford, and young Hale, yielding to temptation, went to see a play. And like so many students, before and since his time, he was fascinated. This first view of the world changed all his habits,

and apparently his character. He neglected his studies, abandoned prayer meetings, and became a devotee of the theatre, of sports, and amusements of all kinds. He was an expert in fencing, and in dress, a pronounced fop. He now gave up all idea of the ministry and determined to enter the service of the Prince of Orange, as a soldier.

At this stage of his downward progress, he was called to London with reference to a law suit which involved the title to a part of his patrimonial estate. At this time he had a curious notion of the profession of the law, perhaps derived from his father, who, as I have said, had withdrawn from it, because of its supposed alliance with falsities.

At any rate, he regarded lawyers as a barbarous sort of people, whose calling was unfit for a gentleman. He held them in utter abhorrence. But his property, in part, was in jeopardy, and he had to consult one of this despised class, and fortunately, he fell into the hands of Sergeant Glanville, afterwards Sir John Glanville, who was of great distinction at the bar, and in religion a puritan.

Such was the impression made upon young Hale by Sergeant Glanville, and such his influence, that he abandoned the thought of soldiership, and determined to become a lawyer himself. His Puritan principles too, revived, and henceforth were his guide and armor. He cast anchor now, and it held fixed and fast. About this time he made a vow, that while he lived he would never see a play, nor drink a health. And he never did.

Leaving Oxford, where he had sown his "wild oats" and had his fling, he entered Lincoln's Inn, at the age of nineteen and gave himself, with ardor, to the study of the Law. For two years, he read sixteen hours a day, and afterwards eight hours.

Chief Justice Taney read law with something of the same devotion as Hale, but in his old age, describing his student days, he thought he had made a mistake.

I will read you what he says about those days: "I associated only with students and studied closely. I have for weeks together read law twelve hours in the twenty-four. But I am convinced that this was mistaken diligence, and that I should have profited more if I had read law four or five hours, and spent some more hours, in thinking it over, and considering the principle it established, and the cases to which it might be applied. And I am satisfied, also, that it would have been much better for me, if I had occasionally mixed in the society of ladies, and of gentlemen older than the students." He thought if he had done so his mind would have been refreshed for renewed study, and that he would have learned from them many things which law books do not teach.

Chief Justice Hale far exceeded Chief Justice Taney in the strenuosity of his reading. He read more hours in the twenty-four, and not only abjured society, but would not even read the news of the day—I suppose because such reading was too distracting, and turned his mind aside from his purpose, namely, to gain mental discipline, and solid acquirements. He read and re-read all the year books, text books and reports. He read the Roman law and was of opinion that no one could understand law as a science until he had drunk deep at that fountain. He read Aristotle and Calvin. He studied theology, philosophy, not only metaphysic philosophy, but natural philosophy, mathematics, medicine, anatomy and history.

When he was called to the Bar in his 28th year, Lord Campbell says his acquirements were so extensive that they would have furnished a stock in trade for all Westminster Hall. From the outset he was in full practice. The Bar were awaiting him. He was their consulting counsel; in fact, the Bar were his clients.

He was not an orator. It was neither eloquence, nor manner, nor voice, that gave him prominence in the courts.

It was his deep mind and profound learning which informed and instructed them; and his exalted character which inspired their confidence.

In a few years he stood on the highest rung of the legal ladder. He was beyond all competition, the foremost advocate in Westminster Hall. He was besides, counsel for the accused in many important State trials. He advised the Earl of Strafford when he was impeached (1640) for treason; three years later (1643) he defended Archbishop Laud for the same high crime. The great argument, in his favor, was prepared by Hale, and great it was admitted to be even by the most bitter of the Archbishop's enemies.

Laud was not in fact, guilty of any specific act of treason, but it was urged on behalf of the prosecution, that he had committed a great number of offences, and that in the aggregate they amounted to treason. The figurative, but conclusive, reply of his counsel was, that two hundred black rabbits did not make a black horse!

A witty writer puts the case in this way: The Archbishop, or the church he represented, had cut off a good many Puritan ears for non-conformity, and the Puritans retaliated by cutting off his head! Both Strafford and Laud perished on the scaffold. So did the Duke of Hamilton, Lord MacGuire, the Presbyterian clergyman, Love, and others, whom Hale likewise defended on the same deadly charge of treason. But their fate was not due to any lack of ability or effort on the part of their counsel.

In the storm and strife of political and religious passions, advocacy, however well-grounded, and however, on other occasions, effective, can seldom stay the force of a tempest, or avert its consequences. The voice of history, I think, approves the execution of Strafford. In a great crisis in the history of England, he was a dangerous foe to liberty, and a promoter of measures that threatened to convert the monarchy into an unbridled tyranny.

As to Laud, his real offence, was intolerance. He meant to bring about a re-union of the Church of England, with the Church of Rome. Nine-tenths of the English people were mortally opposed to the scheme. The Crown was in its favor; the Parliament, the organ of the people, was profoundly against it.

In the ensuing war between the Crown and the Parliament, on the religious and political issues involved, both Crown and Church were overthrown. And the King and the Archbishop were both beheaded.

A considerable and a growing part of the Church of England, at the present time, regards the Archbishop as a "Holy Martyr," and now hold solemn services on the anniversary of his death, commemorative of his virtues and his sacrifice. Historians of the School of Macauley, on the other hand, write of him as if he was a fussy old bigot, who deserved his fate.

Hale held lofty views as to the standard of duty a lawyer should observe in the practice of his profession. He scorned the notion that the law should be a mere money making trade; and he considered it a great dishonor, as great as a man is capable of, for a lawyer to speak on what he knows or believes to be the wrong side, for a little money.

In this he differed with Dr. Johnson, whose views on the question, I apprehend, have satisfied the consciences of most lawyers. "A lawyer" he said, "has no business with the justice or injustice of the cause he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge. Consider, Sir: What is the purpose of courts of justice? It is, that every man may have his cause fairly tried, by men appointed to try causes. A lawyer is not to tell what he knows to be a lie; he is not to produce what he knows to be a false deed; but he is not to

usurp the province of the jury and of the judge, and determine what shall be the effect of evidence—what shall be the result of legal argument. As it rarely happens that a man is fit to plead his own cause, lawyers are a class of the community, who, by study and experience, have acquired the art and power of arranging evidence, and of applying to the points at issue what the law has settled. A lawyer is to do for his client all that his client might fairly do for himself, if he could. If, by a superiority of attention, of knowledge and skill and a better method of communication, he has the advantage of his adversary, it is an advantage to which he is entitled. There must, also, be some advantage, on one side or other; and it is better that advantage should be had by talents than by chance. If lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though were it judicially examined, it might be found a very just claim."

Dr. Johnson's views, as I have said, are the views that have generally satisfied the profession. The lawyer who does not misquote the law, nor consciously misinterpret it, and who does not misrepresent or pervert the testimony, is assumed to be within his ethical rights when he urges his client's contention, with such logic, and with such eloquence as he can command, no matter what his private opinion may be as to the real merits of the cause.

I suppose, in the practical affairs of life, it is our duty to steer clear of any laxity, or any lowering of the moral standard, on the one hand, and any over scrupulousness of conscience on the other.

In cases of conscience, however, we are apt to let gain or loss, convenience, or inconvenience, determine the question whether we are too scrupulous or otherwise. You know, one of the most distressing differences between the Puritans and the Established Church, was on the subject of

Sunday. Archbishop Laud, and the High Church clergy, believed and taught, that the early Church, in instituting the Christian Sunday, did not intend to clog its enjoyment, by the requirements and observances of the Jewish Sabbath. The Puritans, on the other hand, demanded that the Lord's day, should be strictly kept, in accordance with Jewish precedent, and Jewish law. Moreover, Parliament had forbidden Sunday pastimes by statute. Archbishop Laud nevertheless ordered every clergyman of the Church to read from the pulpit a declaration in favor of Sunday pastimes, as not only lawful, but desirable.

Here was a pressing question of conscience. If the Puritan clergy disobeyed the Archbishop's order they would be deprived of their churches, and their stipends. Large numbers did so, and suffered accordingly. It is related of one Puritan minister that he read the Archbishop's declaration, having already read the Ten Commandments as part of the service, and then added, "You have heard read, good people, both the commandment of God, and the commandment of man. Obey which you please." I think John Bunyan would have put the matter differently, and have asked his congregation the peremptory question, which he tells us in the Pilgrim's Progress, our Lord addressed to himself, "Wilt thou leave thy sins, and go to Heaven, or have thy sins, and go to Hell?"

When the contest between the major part of the English people, on the one hand, and the Crown and Episcopacy, on the other, with respect to the political and religious questions at issue, was nearing the point when arms alone could determine the result, Hale's position was most embarrassing.

All his biographers concur, that at this time he was "the most learned, the most able, the most honorable man to be found in the profession of the law." All parties were anxious to secure his services. Parliament, after an interval

of eleven years, had been convoked, and he was solicited by his old friends to stand for a seat. He declined, and announced his purpose in the pending struggle, to remain neutral. Lord Campbell declares that neutrality, at such a time, and on the part of such a man, was selfish and cowardly.

What was the explanation of Hale's attitude at this momentous crisis?

It was this. While he was in favor of liberty and the Constitution, and opposed to Star Chamber and High Commission methods of government; he was, nevertheless, a royalist at heart, and feared the overthrow of the throne. For ages the principle of King, Lords and Commons was the fundamental basis of the State. He would curb and limit the royal authority, but he would not destroy the authority itself. Again, while he did not believe that Episcopacy existed *juri divino*, nor that Episcopal ordination was indispensable, nevertheless, he preferred the continuance of a modified form of Episcopal government. As in the case of the Throne, so in the case of the Church, he feared that in the coming conflict its entire fabric might fall.

When what he feared had occurred, when both Church and Monarchy had been overthrown, when Presbyterianism and the Commonwealth had been established he nevertheless acquiesced. He entered Parliament under the Protectorate of Cromwell as member for Oxford, and was a member of the assembly which framed the Presbyterian faith.

In 1654 Cromwell created him a judge of the Court of Common Pleas. In the administration of this high office, he gained, not only judicial eminence, but it has been said, the affections of all honest men as well. When Cromwell died and his son Richard succeeded him as Lord Protector, he offered to renew Hale's commission, but Hale declined. He obviously foresaw, what most men likewise foresaw, that the reign of the Commonwealth in the weak hands of Richard Cromwell could not last. It was foredoomed.

In the so-called Convention Parliament (1660), sitting for Gloucestershire, his native county, Hale introduced a bill to enable the Presbyterians to become a part of the old Church System, which was now being re-established, but his scheme of comprehension failed. He was at all times desirous to bring about a reunion of the more moderate dissenters with the Church, but it was not feasible, in his time, and has not yet been accomplished.

Hale was in favor of recalling Charles II, but under conditions that would safeguard as he thought, the public weal. Parliament, however, trusting to delusive promises on the part of Charles, recalled him, and practically gave him a free hand.

In the first part of his recall (1660), he made Hale Lord Chief Baron of the Exchequer, and subsequently, conferred on him the honor of Knighthood.

Hale gained great distinction as Chief Baron, and his administration of the law, during the eleven years he held that high office, secured the confidence and affection of all classes of his countrymen. He is said to have shown "a certain tenderness towards the dissenters," and endeavored to mitigate, so far as he could, the severity of the laws against them.

Later critics have censured him for his attitude towards witchcraft. He presided at the trial of two old women who were prosecuted for that alleged crime. Hale did not particularly on that occasion, analyze the testimony, but in his charge he told the jury, "he made no manner of doubt at all of the existence of witches, as proven by the Scriptures, general consent, and acts of Parliament."

The old women were convicted and executed, but protesting their innocence even on the scaffold—dying the victims of a prevailing and misguided belief, which mankind, in a later and better day, abandoned and delivered to the winds.

In 1671 Hale was created Lord Chief Justice of the King's Bench, and, as in his prior judicatories he had won renown as a great judicial magistrate, so in this, his last judicial office, he confirmed and established that renown on an imperishable foundation.

On the twentieth of February, 1676, in the sixty-seventh year of his age, he resigned his high office in consequence of ill-health, and descended into the shades of private life. He did not live long enough to lament the loss of his former activities, or to enjoy the repose of retirement. He died at Christmas, in the same year of his resignation.

"He lived and he died," says Richard Baxter, "with the most universal love, honor and praise that ever did any English subject in this age, or any that just history doth acquaint us with."

He was interred in the churchyard at Alderney, in his native County of Gloucester, and his ancestral estate, through the passing generations and centuries, has continued in possession of his posterity, and is now held by one of his lineal descendants.

Henry Flanders.

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NOTES.

THE RIGHT OF ACTION FOR MONEY HAD AND RECEIVED ON A FORGED CHECK.

It has long been recognized that, where a bank pays a check upon a forged indorsement, the bank is the loser; neither the drawer nor the payee is prejudiced by the act. And this rule is in no way altered by the fact that the bank making the payment is not the drawee of the check, but merely discounts it, and afterwards collects from the drawee. "As the non-drawee bank is under no obligation whatever to pay, it does so at its peril; this is a well-known rule."[1] The interesting

[1] 2 Bolles, Banks and Banking (1907), p. 730.

question arises when the attempt is made to fasten the loss upon the bank which dealt with the forger: is the only action that of the drawee bank to recover the money which it has paid, or has the payee of the check a remedy, either upon the instrument or collateral to it, directly against the collector bank?

The general rule may be stated to be, that in the absence of some form of acceptance by the bank, there is no action *upon the check* against it, in the name of the holder of the instrument.[2] A New York case[3] has allowed recovery under such circumstances, where the payee, before bringing suit, procured an assignment of all the rights of the drawer, but this goes rather upon the principle of assignment of a chose in action than upon any remedy under the law merchant. Another form of action was, however, suggested by the Supreme Court of the United States in the opinion in *Bank* v. *Millard*, 10 Wall. 152. *"It may be,"* reads the dictum, "if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the grounds that the rule *ex aequo et bono* would be applicable, as the bank, having assented to the order, and communicated its assent to the paymaster (the drawer) would be considered as holding the money thus appropriated to the plaintiff's use, and, therefore, under an implied promise to pay it on demand."

The quasi-contractual action here suggested has been brought in a great many cases,[4] with successful results, and it seems to be now a well-settled rule of law, that recovery will be allowed upon this form of pleading wherever it appears that the defendant may charge the payment made to the forger, to the drawee bank.[5] "If a negotiable instrument having a forged indorsement comes to the hands of a bank and is collected by it, the proceeds are held for the rightful owners of the paper, and may be recovered by them, although the bank gave value

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[2] *Bank of the Republic* v. *Millard*, 10 Wall. 152 (1869); *First National Bank of Washington* v. *Whitman*, 94 U. S. 343 (1876); *Saylor* v. *Bushong*, 100 Pa. 23 (1882).

[3] *Adler* v. *Broadway Bank of Brooklyn*, 30 N. Y. Misc. 382 (1900).

[4] *Buckley* v. *Bank of Jersey City*, 35 N. J. Law 400 (1872); *Farmer* v. *Bank*, 100 Tenn. 187 (1897); *Bobbett* v. *Pinckett*, 34 L. T. Rep. 851 (1876); *Shaffer* v. *McKee*, 19 Ohio 526 (1869); *Talbot* v. *Bank of Rochester*, 1 Hill. 295 (1841).

[5] *Clark* v. *Warren Savings Bank*, 31 Pa. Superior Ct. 647 (1906).

for the paper, or has paid over the proceeds to the party depositing the instrument for collection."[9]

The question came before the Supreme Court of Pennsylvania in the case of *Tibby Brothers Glass Co.* v. *Farmers' and Mechanics' Bank of Sharpsburg*, 220 Pa. 1. The plaintiff, who had an account with the defendant, had been in the habit of indorsing checks for deposit, though not for cashing, with a rubber stamp. A bookkeeper of plaintiff indorsed several checks drawn to plaintiff's order by customers on other banks, and defendant paid him cash for them, and collected them in due course from the drawee banks. Plaintiff, upon discovering the forgery, procured the checks from their customers, and brought assumpsit for money had and received to their use, against defendant, presenting the cancelled checks as evidence. The Court denied relief, Judge Mestrezat basing his opinion upon the grounds, first, that under the law of Pennsylvania, plaintiff would have no right of action against the drawee banks, and second, because the drawee banks can recover from the defendant the money paid it by them on the forged checks; hence it cannot be held to have been "received by defendant to the use of plaintiff."

The interesting feature about this decision is, that in *Seventh National Bank* v. *Cook*, 73 Pa. 483 (1873) the Court had allowed recovery in this action, where the transaction was confined to one bank—that is, A drew the check on the X bank to the order of B; C, B's clerk, forged B's name and drew the money from the bank, which thereupon charged the check to A. B procured the check from A and recovered against the bank.

The decisions in these two cases, arising under almost precisely similar facts, would seem to point out the test in each instance as to whether or not the quasi-contractual action may be maintained by the holder of the check. If the drawer submits to a charging of the wrongful payment against his account, the remedy reverts to the holder, and the rule of *Bank* v. *Cook* would be followed; whereas, if as in the Tibby case, there is no assurance that defendant will not be proceeded against by the drawees or the drawer as the circumstances may permit, and on the other hand every assurance that some such action will be brought, the holder will be denied relief,

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[9] 1 Morse, Banks and Banking, S. 248.
[1] *First National Bank* v. *Whitman*, 94 U. S. 343 (1876).

and sent back to his action on the original contract against the drawer, his customer or debtor.

This last remedy is always open to him, for it has been universally held that none of the transactions with respect to the forged paper amounts to a "payment" in the technical sense of the term.

The Right of a Third Party to Sue on a Contract.

The right of a third party to sue on a contract, made for his benefit but to which he was not a party, has been recognized so often and by so many jurisdictions, that it seems there must be some consistent principle on which to base it. The concensus of opinion of the textwriters, however, treats it as an anomaly. Certain well recognized transactions must be distinguished. Whenever property is delivered to one man with an obligation attached to the specific property conveyed or delivered, in favor of a third person, there is no difficulty in giving the latter a right to bring an action in his own name. The facts might show, either that the legal title was conveyed with an equitable obligation attached in favor of a *cestui que trust*, or that the legal title passed direct to the third party, by the transaction, and that the promisor became a bailee to deliver —as, for example, delivery of goods to a carrier in fulfillment of a contract to sell. In both of the above cases there is an obligation attached to the specific property conveyed. The right of action in the beneficiary is not based upon contract, but upon a property right. The same transaction creates a contract right in the promisee and a property right in the beneficiary. In the case of *Harrington* v. *Green*, 107 N. Y. Supp. 403 (Nov., 1907), the defendant received a check from the *promisee* for $372—$82.44 of which was for the plaintiff. No reasons were given to sustain the recovery allowed. Nor did the facts show whether the defendant was to pay the plaintiff out of the proceeds of the check. If such was the case, the defendant was clearly a trustee of an undivided moiety for the plaintiff.

The difficulty arises when the promisor receives property, with no obligations attached to the specific *res*, but upon a promise to pay out of general assets, a sum certain to a third party. The latter may or may not be the sole beneficiary—premiums are paid by an insured to an insurance company, which promises to pay a sum certain to a named beneficiary. A mortgagor conveys land to B, who promises to pay the debt

of the mortgage to the mortgagee. A corporation deposits money in a bank to meet the coupons on its bonds, and the bank promises to pay the coupon holders. A parent gives property—real or personal—*inter vivos* or by will—to a son upon his promise to pay certain sums to the daughter. A retiring partner assigns his interest to the remaining partners, who promise to pay the debts of the partnership. A debtor conveys his business to B, who promises to pay the creditors—in none of the above cases has the beneficiary any property right in the specific *res* conveyed, because in every case the promise is to pay out of general assets. Nor can there be any recovery based upon the doctrine of consideration and special promise, because the consideration does not move from the plaintiff. There is neither an assignment of a chose in action, nor a novation. Yet the increasingly large number of decisions permitting the beneficiary to recover[1] show, that whatever may be the apparent technical difficulties, justice requires some remedy to be given to the beneficiary. "Fair expectations should not be disappointed."[2] An exhaustive search of the early common law authorities show, that formerly, such a transaction gave rise to a debt.[3] There is a *quid pro quo* and a promise to pay a sum certain. A contract between the plaintiff and the defendant was not necessary to sustain an action of debt.[4] The action of debt has been said to be obsolete. It seems that its usefulness is still required.

But there is no principle of the common law on which to base an action by the beneficiary, where there has been no *quid pro quo*, but only a special promise.

Two fathers, whose children have intermarried, promise to each other to pay to the son a marriage portion. The son attempts to enforce the promises in his own name.[5] He has suffered no detriment, nor is there a debt. A doctrine permitting a recovery in such a case, is an anomaly. If the line is to be drawn somewhere, this seems to be the place.

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[1] The decisions for and against recovery are exhaustively treated in an article by Mr. Samuel Williston, entitled "Contracts for the Benefit of Third Persons," in XV Harvard Law Review, 767, 1902.

[2] "Law: Its Origin, Growth and Function," by James C. Carter, at bottom of page 18.

[3] See articles by Mr. Crawford D. Hening, entitled "The Limitations of the Action of Assumpsit as Affecting the Right of Action of the Beneficiary," in American Law Register, Vol. 52, p. 779; Vol. 53, p. 112, and Vol. 56, p. 73.

[4] *Starkey* v. *Mill*, Styles 296 (1651).

[5] *Tweddle* v. *Atkinson*, 1 B. & S. 393 (1861).

Section 724 Revised Statutes of the United States Authorizing Production Before Trial.

This section 724 was originally enacted September 24, 1789. The meaning of the words "books or writings * * * which contain evidence pertinent to the issue in cases and under circumstances where they might be compelled to produce the same by ordinary rules of proceeding in chancery," seems to be easily ascertainable by referring to the practice of the English High Court of Chancery upon a bill in equity for discovery of an adversary's documents in aid of an action at law.

It was a matter of common knowledge among English and American lawyers in 1789 that after an action at law was begun either plaintiff or defendant could by an auxiliary bill in chancery obtain production in advance of trial of such of the opponent's documents as tended to prove "the case" at law of the party filing the bill. Such of the documents as were not privileged were ordered to be produced by the defendant and lodged with one of "the six clerks" of chancery, with leave to the plaintiff to take copies. The answer and the documents as above produced were subsequently used in the trial at law. Chancery commonly stayed the proceedings at law by injunction until the proper discovery of documents was obtained.[1]

Production and inspection of documents in advance of the trial at law, being the familiar practice in chancery when the above statute of 1789 was enacted, the manifest intention of Congress was to economize the time of litigants at law by dispensing with the tedious and useless formality of filing an auxiliary bill in equity for discovery of documents before the Circuit Judge in his capacity of chancellor and then, after thus obtaining production and inspection of the documents, of requiring the answer and documents to be transported to the law side of the Circuit Court and there to be read in evidence.

When Congress enacted the words of the Judiciary Act of 1789: "Sec. 15. *And be it further enacted,* That all the said courts of the United States shall have power in the trial of actions at law on motions, &c.," we must assume that this body was familiar with the chancery practice of granting production *before* trial in the case of actions at law. If therefore the Congress was aware of that practice and did

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[1] *Smith* v. *Duke of Beaufort*, 1 Hare 507 (1842); ——— v. *The Corporation of Exeter*, 2 Vesey, Sr. 620 (1755); Langdell on Eq. Pr. (2nd Ed.) 242; *Reynolds* v. *Burgess Co.*, 71 N. H. 332.

not wish to adopt it we should expect that words expressly limiting the right of production to the actual date of the trial would have been substituted for the above very general language which may refer quite as readily to the entire procedure of a common law action as to the particular day of trial.

In contrast to the strong current of judicial authority interpreting this section so as to allow production before trial, a contrary view has been entertained by certain judges—by Curtis, J., in *Iasigi* v. *Brown*, 1 Curtis 402 (1853); by Clifford, J., in *Merchants' National Bank* v. *State National Bank*, 3 Clifford 201 (1868); by *Green, D. J.*, in *U. S.* v. *National Lead Co.*, 75 Fed. 94 (1896). These decisions are based upon the following reasons: Judge Curtis was impressed by the argument that "it would occupy time unnecessarily, and it might be very difficult to decide before hand, whether a paper was pertinent to the issue, and whether it was so connected with the case, that a Court of Equity would compel its production." To this reasoning the reply would appear sufficient that the Federal Court can only act after a hearing upon notice and after receiving such evidence in the form of affidavits and counter-affidavits as give the like information respecting the relevancy of the documents sought as chancery has always required and acted upon when a motion for production of documents was based upon the answer. Judge Clifford's interpretation makes much account of the provision that the penalty of disobedience is not immediate attachment for contempt, as in the case of disobedience to an order for production of documents, but is a non-suit or a default. It would seem, however, perfectly consistent with the main purpose of the statute, *viz.*, to require production of documents "under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery," that the documents could be ordered to be produced *before* the trial and, if the order is disobeyed, the statutory punishment of default or non-suit could be imposed *at* the trial. The reasoning of Green, D. J., seems to rest upon a mistaken idea of the phraseology of the act, as the Judge cites the act as containing the words, "*On the trial of any action.*" But the words in reality are "*in the trial.*"

In *accord* with the recent decision of *Shaefer* v. *Int. Power Co.*, 157 Fed. 896 (Circuit Court So. Dist. of New York), see *post* p. 354, and supporting the interpretation of Sec. 724 advocated in this note see: *Cent. Nat. Bank* v. *Tayloe*, 2 Crach. C. C. 427; *Jacques* v. *Collins*, 2 Blatchf. 23; *Gregory* v. *Chicago R. Co.*, 10 Fed. R. 529; *Lucher* v. *Phoenix Assur. Co.*, 67 Fed. 18;

Boede Co. v. *Bancroft and Son*, 98 Fed. 115. One of the fundamental reasons for permitting discovery in chancery was economy of time in preparing for and trying issues of fact. To give production only at the trial under Sec. 724 would defeat this fundamental object of giving production. See *Lord Montague* v. *Dudman*, 2 Ves. Sen. 398; *Brereton* v. *Gamul*, 2 Atk. 240; *Earl of Glengall* v. *Fraser*, 2 Hare 99.

"VOLENTI NON FIT INJURIA" AS APPLIED TO PERSONS RIDING IN EXPOSED PLACES ON STREET RAILWAY CARS.

The cases relating to the rights of persons occupying exposed places on street railway cars, while generally placed on the ground of contributory negligence, are more properly to be referred to the doctrine of voluntary assumption of risk. Contributory negligence involves the idea of misconduct, a failure to measure up to the standard of care of the average man. Voluntary assumption of risk may exist, although the risk would be incurred by the man of average carefulness.[1] Thus, the average man would stand on the rear platform of a car, although in so doing he may well be held to take the risks of certain dangers that are necessarily incident to that position, such as injuries caused by the normal swaying of the car. Adopting therefore the principle of *"volenti non fit injuria"* in this class of cases we should expect in general to find that a plaintiff is not barred because of his exposed position on a car unless (1) he has voluntarily taken such position, and (2) the injury which he has suffered is one that is peculiarly incidental to that position.

The necessity of transportation has in general been held sufficient to render the taking of the exposed position not voluntary. Thus, it is universally held that a passenger may occupy the platform or runningboard (of an open car) when the inside of the car is crowded;[2] and in the latter case the company owes him a duty of protection from the negligence of their servants,

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[1] For a full discussion of the doctrine of voluntary assumption of risk, see article by Francis H. Bohlen, Esq., 20 Harvard Law Review, p. 14.

[2] For reference to Pennsylvania cases, see P. & L. Dig. of Decis. Col. 22515.

for example, from a collision with another car, or from collision with a wagon standing in the street which was seen by the motorman,[3] but not from collisions with wagons where there was no negligence on the part of the motorman.[4]

The urgency of transportation, however, is not sufficient to prevent the occupation being voluntary when the place is so dangerous that injury must almost necessarily result; thus, where a person standing on the bumper of a car was struck in a rear-end collision,[5] or where a person took his position outside the guard-rail of an open summer car and was struck by a crowd of persons occupying a similar position on a car going in the other direction.[6]

The cases that present greater difficulty and in which there is some divergence of authority are those where a passenger occupies the platform of a car when there is sitting or standing room inside. According to the current of authority such a person is not barred from recovery,[7] although the intimation is that if there were a rule of the company prohibiting persons riding on the platform, notice of which was brought home to the passenger, the result would be otherwise.[8] This result seems in harmony with the principles governing the doctrine of assumption of risk. It would seem that the doctrine should prevent recovery when the injury results from the mere normal swaying of the cars, or even from negligence of persons getting on and off the cars. The Pennsylvania cases, however, have developed a rule which is contrary to the general current of authority. It is held that to ride on the platform of an electric car is negligence *per se*, which bars recovery for an injury received through the negligence of the company.[9] Several reasons may be assigned for this conclusion. (1) The courts of this State have distinguished between the case of persons riding on the platform of a horse car and that of persons riding on the platform of an electric car;[10] this distinction seems

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[3] *Bumbear* v. *United Traction Co.*, 198 Pa. 198.
[4] See *infra*, report of the recent case.
[5] *Bard* v. *Pa. Traction Co.*, 176 Pa. 97. (There being no evidence that he was seen by the motorman of the following car.)
[6] *Harding* v. *Phila. Rapid Transit Co.*, 217 Pa. 69.
[7] *Dolan* v. *Ry.*, 87 N. Y. 63; *Upham* v. *Detroit Ry.*, 85 Mich. 12.
[8] *North Chicago Ry.* v. *Brown*, 179 Ill. 126.
[9] *Thayne* v. *Traction Co.*, 191 Pa. 251.
[10] See language of Chief Justice Mitchell in the last cited case, and *Ry.* v. *Boudron*, 92 Pa. 475.

anomalous. (2) It is an unconscious application of a tendency that exists in the Pennsylvania courts in negligence cases to lay down artificial standards of care,[11] and to select some physical fact as conclusively indicative of absence of care.[12] (3) It is submitted that the result reached by the courts of this State results in part from a misunderstanding of the doctrine of voluntary assumption in risk. The real question under the doctrine of voluntary assumption of risk is, what is the danger that is normally to be anticipated from the position taken up. Manifestly a man in standing on the back platform of a car does not take "upon himself the risk of his position from *any cause*."[9]

Certainly, no court would hold that where a car fell through a bridge whose defective condition was due to the negligence of the trolley company, and all persons on board were overwhelmed in the common disaster, that the plaintiff could not recover because he was standing on the platform. So, in lesser degree, while a person in taking his position on the platform may be held to assume the risk of injuries due to the swaying and jolting of the car, and the crowding of passengers, he should not, it is submitted, be held to take the risk of a rear-end collision.

In the recent case of *Hyde* v. *Seattle Electric Co.* (93 Pac. 903) the plaintiff descended to the step of an open summer car when less than a block from home. A wagon which was proceeding parallel to the car suddenly swerved aside and injured the plaintiff. The decision in favor of the defendant seems in accord with the principles developed above, for conceding the plaintiff was rightfully on the runningboard of the car, there was no evidence of negligence on the part of the company. Thus, the case is distinguished from the case cited above when a wagon was standing in the street and where the collision could have been averted by care on the part of the motorman.[8]

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[11] *I. e.*, not the standard of the average man, but a standard imposed by the court.

[12] Cf. necessity of "stopping" in level crossing accidents; also that the stopping of a car is a prerequisite to recovery in case of an injury sustained by a person leaving a car. The reason for this tendency is to require evidence which is easy of ascertainment by witnesses.

WHETHER IN ESTIMATING THE REASONABLENESS OF RATES PRESCRIBED FOR PASSENGER TRAFFIC THE COURT SHOULD TAKE INTO CONSIDERATION THE EARNINGS DERIVED FROM PASSENGER TRAFFIC ONLY, OR SHOULD TAKE INTO CONSIDERATION THE EARNINGS FROM BOTH FREIGHT AND PASSENGER TRAFFIC.

The Supreme Court of Pennsylvania, in declaring unconstitutional an act of the Legislature fixing two cents as the maximum fare per mile for transportation of passengers on railroads in that State, so far as it relates to the plaintiff company, holds that a carrier is entitled to earn a net income not less than the legal rate of interest, plus a sum sufficient to pay fixed charges, operating expenses, cost of maintaining the plant, and providing for a sinking fund for the payment of debts, besides a fair profit to the owners; and that in determining whether passenger rates are unreasonable or unjust, the passenger traffic of the road should be considered separate and distinct from the freight traffic.[1] There are strong dissenting opinions, which take the view that the earnings from all the branches of the business should be considered as a basis of fixing a rate for passenger traffic which would conform to the test of reasonableness above laid down.

It is well settled that a State may regulate the rates of a business affected with a public use;[2] and this may be done either through the medium of the Legislature or of a commission.[3] Such regulation, however, is subject to review by the courts, and whether the rates are so unreasonable as to operate to deprive the carrier of its property without due process of law, becomes a judicial question ultimately, although it may be primarily a legislative question.[4]

The test of reasonableness applied by the United States Supreme Court has been whether or not the rate permits a fair return on all the property of the carrier used for the convenience of the public,[5] and while the cases have arisen chiefly upon

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[1] *P. R. R. Co.* v. *Phil. County*, 68 Atl. Rep. 676 (1908).

[2] *Munn v. Ill.*, 94 U. S. 113 (1876); *At. Coast Line* v. *N. C. Corp. Com.*, 206 U. S. 1 (1906).

[3] *R. R. Com. Cas.*, 116 U. S. 307 (1886); *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. at 393 (1893); *M. & St. L. R. R. Co.* v. *Minn.*, 186 U. S. 257 (1902).

[4] *M., St. P. & Chicago Ry. Co.* v. *Minn.*, 134 U. S. 418 (1890).

[5] *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362 (1893); *Smyth* v. *Ames*, 169 U. S. 466 (1897).

questions involving freight rates,[6] still the most positive declarations of the Supreme Court upon the subject have been in cases which involved passenger as well as freight rates.[7] The same test has been adopted by the Interstate Commerce Commission.[8]

It has been held, also, that a carrier is not justified in charging an unduly high rate over a particular line which is a part of a great system, merely because that particular line fails to pay expenses,[9] and the right of a State to compel a railroad company to run a particular train for the convenience of the public, even though it entailed a pecuniary loss upon the company, has been sustained by the Supreme Court of the United States.[10]

On the other hand, the Supreme Court has held that in determining the reasonableness of a State regulation of intrastate traffic, all consideration of interstate traffic should be excluded, and that the intrastate rate should be so fixed as to afford a fair return to the carrier upon the capital invested in that branch of its business regardless of the income from interstate traffic.[11] The bald question of separating the freight and passenger rates and the right of the carrier to secure a fair return upon each without regard to the return upon the other, seems, however, not to have been as yet presented to the Supreme Court for adjudication. The attitude of that court toward the question cannot be anticipated with certainty, but the cases cited incline, upon principle, toward the minority view in the principal case.

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[6] *M., St. P. & Chicago Ry. Co.* v. *Minn.*, 134 U. S. 418 (1890); *C. & N. W. R. R. Co.* v. *Dey*, 35 Fed. Rep. 866 (1888); *Ames* v. *U. Pac. Ry. Co.*, 64 Fed. Rep. 165 (1894); *No. Dakota Rate Cas.*, 91 Fed. Rep. 47 (1898).

[7] *C. M., etc., Ry. Co.* v. *Tompkins*, 176 U. S. 180 (1899); *Ga. R. R., etc., Co.* v. *Smith*, 128 U. S. 174 (1888); *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362 (1893); *Smyth* v. *Ames*, 169 U. S. 466 (1897).

[8] *Brabham* v. *Atl. Coast Line*, 11 Interst. Com. Rep. 464 (1905); *Artz* v. *Seaboard Air Line Ry. Co.*, 11 Interst. Com. Rep. 458 (1905).

[9] *Interst. Com. Com.* v. *R. R. Co.*, 118 Fed. Rep. 613 (1902).

[10] *At. Coast Line* v. *N. C. Corp. Com.*, 206 U. S., 1 (1906).

[11] *Smyth* v. *Ames*, 169 U. S. 466 (1897); *No. Dakota Rate Cas.*, 91 Fed. Rep. 47 (1898).

RECENT CASES.

COPYRIGHT.

In Musical Compositions: Perforated Rolls

Perforated rolls, which, when used in connection with mechanical piano players, reproduce in sound copyrighted musical compositions, do not infringe the copyright in such compositions. *White-Smith Music Pub. Co.* v. *Apollo Co.*, U. S. Adv. Sheets, March 16, 1908, p. 319.

Justice Day said: "These perforated rolls are parts of a machine, which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious production. But we cannot think they are copies within the copyright act." *Kennedy* v. *McTammany*, 33 Fed. 584.

In a similar case relative to phonograph discs, the Court said: "It is not pretended that the marks upon the wax cylinders can be made out by the eye or that they can be utilized in any other way than as parts of the mechanism of the phonograph." *Stern* v. *Rosey*, 17 App. Div. (D. C.) 562.

The question came squarely before the English court in *Bosey* v. *Wright* (1899) 1 Ch. 836, and it was there held that the perforated rolls did not infringe the English Copyright Act protecting sheet music. The Court based their decision upon the ground that "the rolls are intended merely for causation and not for indication of the music."

Justice Holmes, in concurring specially, pointed out the evident injustice of the decision, made necessary by the statute. He said, "One would expect the protection to be coextensive, not only with the invention, which, though free to all, only one had the ability to achieve, but with the possibility of reproducing the results which gives to the invention its meaning and worth. On principle anything that mechanically reproduces that collocation of sounds ought to be held a copy, or if the statute be too narrow, ought to be made so by further act, except so far as some extraneous consideration of policy may oppose."

CRIMINAL LAW.

False Pretense: Value

Defendant by his false representations that certain land was worth $11,000, induced the prosecutor to pay him that sum in a sale of the land. The land, it was alleged, was worth only $330. Defendant was indicted for false pretence, and at the trial evidence was given that he knew the land was not worth $11,000. *Held*, when a statement as to value is made as an existing fact, and when the speaker knows it to be false and intends it to be an inducement to the other party, it becomes a false representation of a material fact. And whether it was intended as an expression of opinion or as a fact, is to be determined by the jury. Supreme Court of Ohio, 83 N. E. 802.

The same rule was applied in the recent case of *Crandall* v. *Parks*, 93 Pac. 1018, which was an action to rescind a contract on the ground of fraud.

GUARANTY.

Notice of Acceptance

A executed a guaranty upon an order for goods from B, which contained a condition that the order should not be a binding contract until approved by B. The order and guaranty were delivered to B's agent. B approved the order and shipped the goods, but no notice of the acceptance of the guaranty was given to A. B sues A on the guaranty. Judgment was given for A on the ground that notice of the acceptance of the guaranty is necessary to bind the guarantor. *Smith Co.* v. *Thesmann*, 93 Pac. 977 (Oklahoma).

This follows the rule laid down by the Supreme Court of the United States in *Davis Co.* v. *Richards*, 115 U. S. 524, that mere performance of the offer of guaranty does not complete the contract.

In *Bishop* v. *Eaton*, 161 Mass. 500, it is said that acting on the guaranty completes the contract, but the acceptor must notify the guarantor within a reasonable time after the performance. This duty, however, is performed by the mailing of the letter giving notice, though it never reaches the guarantor. But see *Lennox* v. *Murphy*, 171 Mass. 370.

This rule of notice, which seems to be limited to cases of guaranties, has been adversely criticised. See Hare on Contracts, 320.

HOMICIDE.

The following charge was requested by the defendant and refused by the Court: "The Court charges the jury that one of the ingredients of murder in the second degree is willfulness and malice aforethought, and unless the jury believe beyond all reasonable doubt that the deceased came to his death by blows inflicted upon him by the defendant intentionally and with malice aforethought they cannot find him guilty of murder in the second degree." *Held*, the trial Court did not err in refusing the charge; "that it was misleading, for the use of the word 'aforethought' as applied to murder in the second degree." *Smith* v. *State*, 45 South. Rep. 626.

Trial: Instructions: Requests

An authority in support of the conclusion in the principal case is *Wilson* v. *State*, 128 Ala. 17, in which it was said: "A term giving rise to views so divergent would probably have confused the jury and misled them to believe that premeditation was a necessary ingredient of murder in the second degree, whereas malice which may arise on the instant and without deliberation, when concurring with an intention to kill, may constitute that offense."

Both authority and principle seem to be contra to this decision, however. "The word 'aforethought' does not necessarily require either deliberation or premeditation." Bishop on Criminal Law. "To bring a killing within the provision 'deliberate and premeditated,' it must be such as would be murder at the common law, otherwise expressed it must be of 'malice aforethought;' added to which, it must be 'deliberate and premeditated.'" *Smith* v. *S.*, 68 Ala. 424. "The malice which is an essential element in the offense of murder, has always been described as malice aforethought." *Ethridge* v. *State*, 141 Ala. 29; *Fields* v. *State*, 52 Ala. 348.

PRINCIPAL AND SURETY.

In a building contract, it was specified that no instalment should exceed seventy-five per cent. of the cost of materials delivered for the work. The contractor fraudulently substituted materials inferior to those named in the contract, and by collusion with the engineer of the one for whom he was building, instalments were made exceeding seventy-five per cent. of the cost of materials actually furnished but not ex-

Departure From Contract Obtained by Fraud of Principal

PRINCIPAL AND SURETY (Continued).

ceeding seventy-five per cent. of the materials pretended to be furnished. *Held*, that the claim of the contractor's surety to be discharged on the ground that the creditor had failed to maintain the reserve stipulated for by the contract until the work was completed, was not sound. *Van Buren County* v. *American Surety Co.*, 115 N. W. 24. It is generally held that where, by the terms of the contract, the principal is to be paid in instalments, and he is paid faster than the contract provides, a surety for the completion of the work to be performed by the principal is discharged. *Calvert* v. *Dock Co.*, 2 Keen 638. One court has held, where the principal by fraud obtained money not due from the creditor, that the surety is discharged, *Goodin* v. *Ohio*, 18 Ohio Rep. 6; but the better rule seems to be that under such circumstances the surety is not discharged even though the negligence of the creditor's agent made the principal's fraud easier of accomplishment. *Ryan* v. *U. S.*, 22 U. S. Supr. Ct. Rep. (L. Ed.) 172.

PAYMENT.

Pre-Existing Debt: Promissory Note: Presumption

Where a debtor executes his note, governed by the law merchant, for a pre-existing debt, such note is only a *prima facie* presumption of payment of the debt; but where this presumption of payment deprives the party accepting it of collateral security or some other substantial benefit, such circumstance rebuts the presumption of payment. This rule is the same where the debtor, at the instance of the creditor, executes his note to a third person. *Beach* v. *Huntsman*, 83 N. E. (Ind.) 1033.

This rule of law that the giving of a promissory note by a debtor to the creditor or to a third person, at the request of the creditor, is *prima facie* payment of the pre-existing debt obtains in the jurisdiction of Massachusetts, Maine, Vermont, Indiana and Louisiana. *Paddock* v. *Simmons*, 186 Mass. 152; *Krider* v. *Knox*, 48 Me. 551; *Dickenson* v. *King*, 28 Vt. 378; *Hunt* v. *Boyd*, 2 La. 109.

In all jurisdictions, except as above, a promissory note given by the debtor to the creditor or to a third person at his request does not raise a presumption of payment of the pre-existing debt, but is governed by the agreement of the parties. *Owen* v. *Morse*, 7 T. R. 66; *Price* v. *Price*, 16 M. & W. 240;

PAYMENT (Continued).

Sweet v. *Jones*, 2 R. I. 292; *Mooring* v. *Mobile*, 27 Ala. 256; *Bank* v. *Daniels*, 12 Pet. 32; *Phila.* v. *Stewart*, 195 Pa. 314.

But, unless otherwise agreed, it does raise a presumption of conditional payment which merges the debt in the note and suspends all right of action on the debt during the running of the note. *Ward* v. *Evans*, 2 L. Raymond 928; 2 Ames Bills and Notes 571; *Kilpatrick* v. *Association*, 119 Pa. 36; *Humelstown* v. *Knerr*, 25 Pa. Sup. 467.

SALES.

Fraudulent Conveyances: Retention of Possession by Vendor

A purchased an automobile from C, giving a note and extinguishing an old debt in payment. He allowed it to remain in C's possession, and permitted C to use the same in consideration of its storage in C's garage. Subsequently, C mortgaged the machine to B, who took possession of it. In an action of replevin A was permitted to recover, and it was held that whether the retention of possession by the vendor was fraudulent upon the subsequent mortgagee was a question for the jury. *Wilson* v. *Walrath*, 115 No. West. 203 (Minn).

Whether retention of possession by the vendor after a sale is fraudulent upon a subsequent innocent vendee for value, appears to have been first dealt with in Twyne's Case, 5 Eng. Rul. Cas. 21, interpreting St. 13 Eliz. C. 5 and St. 27 Eliz. C. 7. It was there ruled in point of law to be fraudulent. The English court, after considerable shifting, has finally determined it to be merely presumptive of fraud, which may be rebutted. *Cookson* v. *Swire*, 9 App. Cas. 653.

The American cases have, either under statute or common law, taken three views: First in following the early English view, *Stephen* v. *Gifford*, 137 Pa. 219; secondly, holding it a presumption of law which may be rebutted, *Hobbs* v. *Bibb*, 2 Stew. 54; thirdly, that the retention is only *prima facie* evidence of fraud, and is a question for the jury. The majority of States, together with the Federal courts, have adopted the third view, *Mohton* v. *Robinson*, 40 Mich. 200; *Warner* v. *Norton*, 20 How. 460. The principal case which is an interpretation of a State statute, is in accord with this majority view which represents the modern tendency.

WATER COURSES.

Removal of Artificial Constructions

A canal company, under a franchise from the State, constructed a cross-canal, which drained a lowland in an artificial course. B built upon the land relying upon the new flowage. After forty years A, who was then owner of the canal, obstructed the cross-canal thus throwing back the water to its original drainage, and thereby flooding B's land. *Held*, that A could not be restrained from obstructing the cross-canal and establishing the original flow. *Lake Drummond Canal and Water Co.* v. *Durnham, et al.*, 60 So. East. Rep. 650 (N. Co.).

The question whether one may return to its true course a stream, which has been controlled by an artificial device for the prescriptive period, has frequently come before the courts. Almost uniformly the answer has been in the negative. The reasons assigned are: First, the one against whom the right to divert has been acquired, has himself gained a prescriptive right to insist that the new course be maintained, *Mathewson* v. *Hoffman*, 77 Mich., 420; secondly, it is a species of dedication to the public use, *Ford* v. *Whitlack*, 27 Vt. 265; and thirdly, where a change has been made which presents the appearance of permanency, the doctrine of estoppel will prevent a stream being reverted to its ancient course to the injury of one who has been induced to act upon such appearances, *Smith* v. *Musgrove*, 32 Mo. App. 241.

The objection to the first reason is that the user of him against whom the right to divert has been acquired, cannot be called adverse; to the second that dedication must be to the public, while here it is simply to the individuals who happen to be within the radius of the change in flow. Farnham on Water and Waters, p. 2331.

The third reason, while perhaps the best, admits of much judicial discretion in determining what change exhibits sufficient permanency. In the present case a user of forty years was held only temporary. It might very well, with more justice and accordance with authority, have been held contra. *Withers* v. *Purchase*, 60 L. T. N. S. 819; *Belknap* v. *Trimble*, 3 Paige 577.

BOOK REVIEWS.

REPORTS OF THE AMERICAN BAR ASSOCIATION. Volume XXXII. A Reprint of an Essay on Professional Ethics. By Hon. George Sharswood. Philadelphia. T. & J. W. Johnson Company. 1907. Pp. 193.

No more striking mark of appreciation of intrinsic worth of a legal treatise can be conceived of than its republication by the American Bar Association fifty-four years after the date of its original appearance, and when, in addition to this unique tribute is added the further fact that this republication is made with the clear purpose of stimulating in the bar of this country a true realization of the high standard of ethics which the profession must maintain in public and in private life, it is indeed more than a renewed recognition of the value of the book, it is rather a worthy memorial of the influence for good of one of the noblest leaders of the legal profession. In honoring Chief Justice Sharswood by the reprinting of his well-known work on "Professional Ethics," the American Bar Association has taken a wise method of advancing the work of its committee on a code relating to that subject. No member of the association can read the vigorous work of Justice Sharswood without feeling a quickened determination to aid in preventing the practice of the law from becoming a mere branch of commerce. No one can study the discriminating discussion of the relations between the attorney, the court and the client without again realizing the manifold and delicate obligations which rest upon every counsellor. Consider for a moment the scrupulous nicety which the author (p. 111) displays in analyzing the duty of a lawyer in preparing an affidavit. Examine the earnest plea he makes (p. 69) for a strict upholding of the relative responsibilities of the court and the jury. Compare these thoughts with the every day practice in these matters and the need and the value of the republication of this legal classic are at once apparent.

R. D. J.

FEDERAL USURPATION. By Franklin Pierce, of the New York Bar. New York: D. Appleton & Co. 1908. Pp. xx, 437.

Mr. Pierce has written a vigorous, readable volume embodying the views of those opposed to the alleged centralization of power in the national government. He does not profess to have written a law book, but in his preface says: "This book is a plea for the sacredness of the Constitution of the United States." His thesis is that the Constitution is virtually being amended by the usurpation of power by the President, by manipulation through the judicial interpretations of the Supreme Court and by the undemocratic system of government by committees in vogue in Congress.

In the chapter on "Executive Usurpation," Mr. Pierce cites numerous executive statements and acts to show the growth of the power of the President, concluding the chapter with a strong arraignment of President Roosevelt. The chapter on "Congressional Usurpation" and the "United States Supreme Court" are replete with facts and citations which apparently substantiate Mr. Pierce's charge, that the States are being deprived of their constitutional rights by this insidious system of usurpation rather than by the method of amending the Constitution provided by that instrument itself. The author quite despairs of present conditions, and in the last chapter of his book, entitled, "How to Restore the Democratic Republic," suggests a convention for the amendment of the National Constitution. He says, "This Constitution is the most undemocratic instrument to be found in any country in the world to-day." His book, although somewhat radical, is forcibly suggestive and well written.

R. W. B.

NEGLIGENCE IN LAW. By Thomas Beven, of the Inner Temple. Third edition, two volumes. London: Stevens and Haynes. Toronto: Canadian Law Book Co. Philadelphia: Cromarty Law Book Co. 1908. Pp. cciv, 1-726, 727-1505.

This edition of Mr. Beven's work is not as valuable for the American practitioner as the previous edition, owing to the fact, which he fully explains in the preface, that an attempt to present the law of the United States side by side with that of England is impossible of success and inexpedient. The

reason for Mr. Beven's decision in this respect comes from his conclusion that "though of the same parentage as ours, American law has in late years been developing along divergent lines, and accepts principles widely applicable that are to us not only novel but fundamentally unsound." Specific instances are cited, one the case of *Lawrence* v. *Fox*, 20 N. Y. 268, concerning which, Mr. Beven says: "this case decides, that a telegraph company is responsible not only to the sender of a message, but also the addressee; that persons not parties to a contract may, nevertheless, sue for damages for its breach," while in England the contradictory principle is well settled.

Two characteristics of Mr. Beven's method of treatment make these volumes of universal interest: first, his searching inquiry into the validity of the decisions of the courts; and second, the notes in which the author traces the history of many of the principles of the law of negligence, and also shows how and when changes have been made in them. Relative to his keen analysis and criticism of decisions, the author says: "It may be as Lord Coke tell us, that the whole common law of England resides in the breasts of the judges; but in welling from the sanctity of its source it is apt to flow into distractingly cross-currents and to tinge itself with strong individual traces of the particular channel through which it is drawn. To find the true pure stream is a little difficult without the assistance of those methods which purge error in the realms of science or philosophy." For the notes tracing the history of principles and theories, Mr. Beven apologizes, but for the practitioner intent upon the understanding and application of a particular principle to certain concrete facts, these historical notes are of great value.

It is not often that the *style* of the writer of a good usable law book attracts attention, but Mr. Beven's clear vigorous English has lost none of its charm in this edition of his text. One must, aside from the greatness of Mr. Beven's work as a treatise on the law of negligence, characterize it as *attractive*, in beauty of diction, keenness of logic, clearness in the statement of principles, and in the scientific classification of the subject matter of the text.

R. W. B.

MINING, MINERAL AND GEOLOGICAL LAW. A treatise on the law of the United States involving Geology, Mineralogy and allied sciences, as mining, real estate, public land, United States customs and other litigation. Also the acquisition and maintenance of mining rights in the public domain and obtaining patents for mineral land under the United States mining laws. By Charles H. Shamel, M. S., LL. B., A. M., Ph. D. 1907. London and New York: Hill Publishing Co. Pp. xxx, 627.

The law is the only profession whose practitioner may be called upon at any time to show himself familiar with the principles and details of any art, science or business whatsoever. To make it at all possible for the lawyer to do this, text books have been written upon a number of the arts and sciences in their legal aspects. The most familiar of these are the works on medical jurisprudence. The present work is a treatise on those aspects of geology which may be of use to the lawyer when considering mining questions, and to the mine owner when considering legal questions.

Adequate works of this two-faced kind are as rare as are men eminent in two professions, but the present book is thoroughly adequate.

The main portion of the book is occupied with the discussion of the various theories of vein formation and to this end all the latest authorities are cited. As is pointed out, the proper theory of the formation of ore deposits is very important in many litigations. The law peculiar to mining rights is then set out.

About a third of the volume is occupied by an appendix which includes the United States mining laws and land office regulations, State and Territorial mining laws, a bibliography and an elaborate table of rock classification and geological formations. The State statutes given are only those of the Western mining States, and are limited to those laws concerning property rights in mines and mining claims. The police statutes are omitted. The full bibliography is one of the features of this work, which is all too seldom met with in books of this class.

This work ought at once to become standard in its department.

S. B. S.

THE GROUNDS AND RUDIMENTS OF LAW. By W. T. Hughes. Vol. I. Chicago: Usonia Book Co. 1908. Pp. xix, 356.

Mr. Hughes has professedly undertaken to condense a vast amount of legal learning within the scope of this small book. "The Grounds and Rudiments of Law," as outlined by him, are largely maxims found in "Broom's Maxim's." Mr. Hughes' attitude toward the law and his grandiloquent use of English throughout the book is shown in the opening sentences of his preface: "Bacon and Paul must ever remain two of Justitia's greatest sons! Wrapped in individualistic solitude they stand above all." There are chapters entitled "The Fountains of the Law," "Renaissance of the Civil Law," and "Estoppel." The book is practically valueless for the practitioner, owing to the florid style of the author and his utter lack of solidity and continuity of treatment of the subject matter. The book as a whole discusses subjects that do not present practical difficulties to the lawyer or student, and the author's burdened seriousness is distinctly amusing as expressed in such sentences as on page 7 of the chapter entitled "Fountains of Law," where he says: "The unshackled savage of America was appalled at the national holocaust in Peru submerged in rapine and in blood."

R. W. B.

DATUM POSTS OF JURISPRUDENCE. By W. T. Hughes. Chicago: Usonia Publishing Co. 1907. Pp. xiv, 250.

A "Datum Post," according to Mr. Hughes, is "a point from which a reckoning is made." In this little volume, the author undertakes to condense and arrange for practical use 416 leading cases, and the various maxims and principles of law illustrated thereby. The chief characteristic of the work is the attempt to condense without sacrificing clearness. The author has succeeded in this remarkably well, but it seems doubtful whether either the practitioner or the careful student would be satisfied with the condensed statement of the author if the original cases are available. The grandiloquent style of the author, so evident in his later work "The Grounds and Rudiments of Law" is not apparent in this work, except in the preface. If a condensed from of a number of "Leading Cases" is needed, Mr. Hughes's book furnishes it.

R. W. B.

A TREATISE ON ELECTRIC LAW, COMPRISING THE LAW GOVERNING ALL ELECTRIC CORPORATIONS, USES AND APPLIANCES, ALSO ALL RELATIVE PUBLIC AND PRIVATE RIGHTS. Second Edition. By Joseph A. Joyce and Howard C. Joyce. Two Volumes. New York: Banks Law Publishing Co. 1907. Pp. cxc, 1774.

The modern tendency to produce legal treatises dealing with a branch of the law included within empirical rather than analytical boundaries is well illustrated by Joyce on Electrical Law. From a legal standpoint there is no real reason, for example, why cases dealing with the rights and duties of electric light corporations should be grouped together merely because they furnish illumination by means of filaments or carbons heated by the passage of an electric current. However there is a real basis of convenience in bringing together within two volumes a discussion of every case in which persons or corporations dealing in or utilizing electricity are concerned, because it is of course true that the resulting problems represent a special class when considered from the purely business standpoint.

The authors have been unusually successful. The earlier edition has been thoroughly gone over and brought down to date by the introduction of much new material. So recent has been the revision that an extended section has been included dealing with the question of wireless telegraphy. The work also includes a very careful examination of the questions arising under the Post Roads Acts and of the Interstate Commerce clause of the Federal Constitution (Chapter IV.) and of the corporate powers of telegraph, telephone and electric light companies (Chapter XIII). The vexed question as to whether and under what circumstances an electric light telegraph or telephone line constitutes an additional burden on the highway for which an abutting owner may claim compensation (See Sec. 296, sq.) is adequately treated. In connection with this discussion it is curious that the latest Pennsylvania Supreme Court case, Brown vs. Radnor Electric, &c., Co., 208 Pa. 453 (1904) has not been noted, while a country court case has been referred to in some detail (Sec. 331a).

In the first part of the second volume there is a painstaking discussion of the intricate legal problems presented by induced and interfering currents.

The discussion of such questions as injuries to passengers on electric cars, the abuse of authority by street railway employees, &c., could have profitably been omitted as these

subjects are adequately covered by existing works and the mere fact that an electric current is the motive power by which the car is propelled, does not bring these cases within any proper meaning of Electric Law. On the other hand if a chapter had been added on the elementary technique of Applied Electricity it would have been of great assistance to the busy practitioner, who in cases involving the preparation or interpretation of every-day electric contracts is bewildered as to the meaning of the most ordinary terms and in the examination of witnesses in suits involving the overloading of motors, &c., is hopelessly perplexed by the words of even "one syllable" in electrical nomenclature.

R. D. J.

LEGAL ESSAYS. By James Bradley Thayer, LL.D. Edited by Ezra Ripley Thayer. Boston: Boston Cook Company. 1908. Pp. xvi, 402.

This collection of Legal Essays, of the late Professor Thayer, will be of universal interest to the legal profession. It contains a number of papers prepared by Professor Thayer for delivery on special occasions and hitherto unpublished, together with others published from time to time in the Harvard Law Review, and elsewhere. Ezra Ripley Thayer, who has collected his father's essays for publication, states in the preface that no changes have been made in the original except the occasional correction of a clerical error. The editor has prefaced such essay with a short account of the occasion of its original publication or delivery. "The Origin and Scope of the American Doctrine of Constitutional Law" is an address given before the Congress on Jurisprudence and Law Reform, at the World's Fair, at Chicago, on August 9, 1893. Professor Thayer discussed before this Congress the power of the American Judiciary to declare legislative Acts unconstitutional. The essay on "Advisory Opinions" or opinions in which the Judiciary advises the Legislative branch of the government, was written at the request of Chief Justice Bradley, of Rhode Island. The history of this practice in the United States is outlined and the legal quality of such opinions discussed.

This book of essays is more than a set of legal discussions. It shows the human side of Professor Thayer, in the addresses and essays he prepared and delivered before non-professional audiences. In the essay entitled, "The People Without Law,"

Professor Thayer's deep interest in the welfare of the American Indians is shown. He made many addresses on this subject, giving his time freely for years, insisting that it was the duty of the Government to bring the Indians under the protection and control of the ordinary laws of the land. In this essay, originally published in the "Atlantic Monthly," Professor Thayer discussed in a style even more delightful than that used in his professional work, the legal and political history of our relations with the Indians, setting forth his own idea of a constructive governmental policy toward them. Another essay of a non-professional character, and at the same time combining the legal acumen of Professor Thayer with his ability to clarify a subject for a non-professional audience is "Our New Possessions," which was read before a small dining club, of which Professor Thayer was a member.

Bedingfield's Case—"Declarations as a Part of the Res Gesta"—is the most extensive essay in this volume. It was published in the "American Law Review" in 1880 and 1881, and has been cited as authority by many of the higher courts in the United States. One of the most delightful essays of this volume is that entitled, "Trial by Jury of Things Supernatural." This too was first read before the dining club referred to above. It was published in the "Atlantic Monthly" for April, 1890, but is of special interest at this time, owing to the recent criminal cases involving various methods of mental and spiritual healing.

R. W. B.

REPORT OF THE NINETEENTH ANNUAL MEETING OF THE VIRGINIA STATE BAR ASSOCIATION. Edited by John B. Minor. Richmond Press. 1907. Pp. 300.

Added to the committee reports and other proceedings usual at meetings of Bar Associations, are several interesting articles. The one of the widest bearing is by Hon. John R. Dos Passos, on "The Results and Responsibilities of our Representative Democracy," in which the author discusses the necessity of restricting immigration and suggests the desirability of separating citizenship and the right to vote. The vital part of the article is a protest against the extension of the power of the Federal Government to deal with such commercial questions as the creation and control over corporations. Another article of current interest is on "The Eleventh Amendment," by Allen Caperton Braxton.

R. D. J.

LEADING ARTICLES FROM RECENT LEGAL PERIODICALS.

Domicil.

Is the Renvoi *a part of the Common Law?* Edward H. Abbot, Jr.

The question to be decided is one which arises under the somewhat complicated state of affairs which is stated as follows: "Suppose that A dies leaving movables in England, that according to English law his last domicil was French, and that according to French law his last domicil was English. Assuming that England will apply the law of A's domicil at the time of A's death, by what law will England distribute these movables?" "If the common law reject the *renvoi* (a noun coined from a French verb *renvoyer* to describe a doctrine which has excited much controversy in the civil law), England will consider irrelevant the French conclusion as to A's domicil, and will apply the French Statute of Distributions immediately. If, however, the common law include the *renvoi*, England will accept the French conclusion as to A's domicil and permit France to send back the case to English law for farther determination." The author contends that the *renvoi* (advocated by Westlake) if logically carried out, involves a perpetual deadlock. The English cases show a conflict of authority; the American cases follow the earlier English cases which were adverse to the *renvoi*. The discussion gives a very clear and interesting review of an important point in private international law.—*Law Quarterly Review*, Vol. 24, No. 94. Pp. 133-146. April, 1908.

History.

The Middle Temple Library. C. E. A. Bedwell, Sub-Librarian to the Hon. Society of the Middle Temple.

A short but interesting historical review of the foundation and subsequent growth of the library, and its various buildings. The new buildings were opened for use in 1861, so that there are no historical associations connected with the present building.—*Law Magazine and Review*, 33. Pp. 274-282. May, 1908.

America and the Middle Temple. C. E. A. Bedwell.

It is interesting to find the sub-librarian of the Middle Temple Library interesting himself in the historical connection between that

library and this country. He has found much of value to set down, not the least interesting fact being that five of the signers of the Declaration of Independence were members of the Middle Temple—Edward Rutledge, Thomas Heyward, Thomas Lynch, Arthur Middleton and Thomas McKean. John Dickinson, Arthur Lee, William Livingston and Peyton Randolph were also members. Mr. Bedwell seems justified in his claim that "the legal knowledge acquired in the Inn, made a considerable contribution to the establishment of sound government," and it is not uninteresting to find a certain note of pride in the statement of an Englishman that his society "may lay claim to have aided in equipping it (the United States) for an independent life upon its attainment of a separate existence."—*Green Bag*, 20. Pp. 182-187. April, 1908.

The Law of the Universities. James Williams.

This is a short sketch of the early laws, with a few more modern instances, of the English Universities of Cambridge and Oxford. The earliest university statute is said to be that of 1252. The new statutes of Oxford were published in 1882, of Cambridge in 1883, although some of the minor colleges of the foundation are still unaffected by any recent legislation.—*Law Magazine and Review*, 33. Pp. 264-273. May, 1908.

The House of Lords. C. R. A. Howden.

The House of Lords as a political question has become a very live factor in English thought, and this article is given with the thought that under the circumstances "it may be useful to be reminded of its constitution and history." The political side of the question is avoided, and the article begins with an examination of the constitution of the Witenagemote, its powers and duties. The changes made in this old parliament by the Norman conquest, are then noted in this portion of the article, which is to be continued.—*The Juridical Review*, 20. Pp. 16-31. April, 1908.

ADOPTION.

An Example of Legal Make-Believe. P. J. Hamilton-Grierson.

The legal fictions by which the various countries have "make-believe" that the adoptive child was the real child of the parents are here examined, and the author has succeeded, as he expresses the hope of doing, in making "a not uninteresting chapter in the history of the human mind—the chapter regarding make-believe."—*Juridical Review*, 20. Pp. 32-46. April, 1908.

Biography.

The Legal Career of Senator Knox. Henry M. Hoyt.
Green Bag, 20. Pp. 161-169. April, 1908.

Charles W. Fairbanks as a Lawyer. Hon. John C. Chaney.
Green Bag, 20. Pp. 221-223. May, 1908.

Judson Harmon. Hon. H. D. Peck.
Green Bag, 20. Pp. 239-243. May, 1908.

Each one of the persons selected for these biographies has become of interest to the country, since they have all been—if they are not still—often mentioned among the "Presidential possibilities" of the coming years. It is pleasing to learn as we read these biographies, that they are all so eminently adapted to fill the highest position in the gift of the nation. We do not learn that they have ever made any mistakes, have had any failures, or even misfortunes. It might even seem that the uniform smoothness and success which they have hitherto met might have in a measure unfitted them for the often stormy life, the deep mental and moral struggles, which a conscientious executive in Washington must encounter.

Contracts in Restraint of Trade.

The Sherman Law and Contracts in Restrain of Trade. Paul Edgar Lesh. (2 Hen. V.)

Mr. Lesh begins with the citation of a case from the Year Books, which, if not the first case of the kind, as he claims, since there are cases even as far back as Edward II, which might be cited in support of his contentions, is a very good one, and confirms the recently aroused feeling among many persons, that the Year Books, after all, are very interesting reading. Mr. Lesh does not remain in the atmosphere of the Year Books for a very long time, and we are soon led to an examination of the United States Statutes upon the point; the Sherman "anti-trust" Act of 1890 and its amendments. After an examination of the decisions under this act and the amendments, Mr. Lesh comes to the following conclusions: "(a) Any interference, however reasonable, with the natural play of competition is a restraint of trade; (b) the element of restraint must enter *directly* into a contract to bring it within the purview of the act; (2) The statute makes such a contract illegal and void; gives rise to a right in the government to prosecute criminally the contractors, to enjoin the carrying out of the contract, and, in proper case, to seize the property involved; and gives to an individual injured a right of action for three-fold damages."—*Green Bag*. 20. Pp. 188-197. April, 1908.